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REPORTS OF CASES

HEARD AND DETERMINED

BY

THE JUDICIAL COMMITTEE,

AND

THE LORDS

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL,

ON

APPEAL FROM THE SUPREME AND SUDDER DEWANNY COURTS

IN

THE EAST INDIES.

BY EDMUND F. MOORE, ESQ.,
BARRISTER AT LAW.

1837—1841.

LONDON:
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OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL,

ESTABLISHED BY THE 3RD & 4TH WILL. IV. C 41,

FOR HEARING AND REPORTING ON APPEALS TO HER MAJESTY IN COUNCIL.

1837—1841.

THE Marquis of *Lansdowne*, Lord President.

Lord *Cottenham*, Lord High Chancellor of Great Britain.

The Duke of *Portland*, formerly Lord President.

The Marquis of *Camden*, formerly Lord President.

The Earl of *Harrowby*, formerly Lord President.

The Earl of *Eldon*, formerly Lord High Chancellor of Great Britain.

Lord *Lyndhurst*, formerly Lord High Chancellor of Great Britain

Lord *Wynford*, formerly Lord Chief Justice of the Common Pleas.

Lord *Brougham*, late Lord High Chancellor of Great Britain.

Lord *Denman*, Lord Chief Justice of the Court of King's Bench.

Lord *Abinger*, Lord Chief Baron of the Court of Exchequer.

Lord *Langdale*, Master of the Rolls.

Sir *John Nicholl*, Knt., Judge of the Admiralty.

Sir *Nicholas Conyngham Tindal*, Knt., Chief Justice of the Court of Common Pleas.

Sir *William Alexander*, Knt., formerly Lord Chief Baron of the Court of Exchequer.

Sir *Lancelot Shadwell*, Knt., Vice Chancellor of England.

Sir *Robert Graham*, Bart., formerly one of the Barons of the Court of Exchequer.

The Right Hon. Sir *Thomas Erskine*, Chief Judge of the Court of Bankruptcy.

Sir *William Garrow*, Knt., formerly one of the Barons of the Court of Exchequer.

Sir *James Parke*, Knt., one of the Barons of the Court of Exchequer.

Sir *John B Bosanquet*, Knt., one of the Judges of the Court of Common Pleas

Sir *John Bailey*, Bart., late one of the Barons of the Court of Exchequer.

Sir *John Vaughan*, Knt., one of the Judges of the Court of Common Pleas.

Sir *Herbert Jenner*, Knt., Judge of the Prerogative Court.

The Right Hon. Dr. *Lushington*, Judge of the Admiralty.

PRIVY COUNCILLORS, ASSESSORS.

Sir *Edward Hyde East*, Bart., formerly Chief Justice of the Supreme Court at Calcutta.

Sir *Alexander Johnston*, Knt , formerly Chief Justice of the Supreme Court of the Island of Ceylon.

MEMORANDA.

On the 28th of September 1836, Sir *Robert Graham*, Bart., died.

On the 13th of January 1838, the Earl of *Eldon* died

On the 26th of August 1838, the Right Hon Sir *John Nicholl*, Knt., died.

On the 25th of September 1839, the Right Hon. Mr. Justice *Vaughan* died.

On the 24th of September 1840, the Right Hon, Sir *William Garrow*, Knt. died.

On the 8th of October 1840, the Marquis of *Camden* died.

On the 10th of October 1841, the Right Hon. Sir *John Bailey*, Bart., died.

On the 17th October 1838, Dr. *Lushington* was appointed Judge of the High Court of Admiralty, in the room of Sir *John Nicholl*, Knt., deceased, and was appointed one of Her Majesty's Most Honourable Privy Council.

On the 9th of January 1839, the Right Hon. *Thomas Erskine*, Chief Justice of the Court of Bankruptcy, was appointed a Judge of the Court of Common Pleas, in the room of Mr Justice *Park*, deceased.

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ON APPEAL FROM THE SUPREME AND SUDDER DEWANNY COURTS IN THE EAST INDIES.

SRI RAJAH KAKERLAPOODY JAGGANADHA JAGGAPUTTY RAZ, Bahadur } *Appellant,*

v.

SRI RAJAH VUTSAVOY JAGGANADHA JAGGAPUTTY RAZ, Bahadur - - - } *Respondent.**

On Appeal from the Sudder Dewanny Court of Madras.

7 & 8 December 1837.

THIS was a cause arising out of a transaction in the nature of a mortgage, under the following circumstances.

A *Mootah* being advertized for sale by order of the Collector, for arrears due to the Government, the proprietor applied to a party to become security for the payment thereof by certain instalments; and thereupon deposited a *Sunud* and *Arzee* in the hands of a third party, and executed a *Kararnamah* or agreement, by which the transfer of the *Mootah* to the guarantee was made absolute, in case of default by the

* Present: Members of the *Judicial Committee*,—Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, the Right Hon. Thomas Erskine, Chief Judge of the Court of Bankruptcy.

Privy Councillor,—*Assessor*, Sir Edward Hyde East, Bart.

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Sri Rajah Vutsavoy Jagganadha Jaggaputty Raz, the Respondent, was the proprietor, in zemindary tenure, of the *Mootah** of *Cottam*, in the *Zillah* of *Rajahmundry*. In the month of *July* 1812, he was in arrear to Government R. 29,308, for revenue due in respect of the *Mootah* for the *Fusly* year 1221 (A.D. 1811), and he owed also a sum of R. 2,000 to one *Goondoo Sobanadry*. Being unable to discharge this arrear, and desirous of preserving the *Mootah* from public sale (notice of which had been advertised by the Government), he applied to his uncle, *Sri Rajah Kakerlapoody Jagganadha Jaggaputty*, the Appellant, to give security to the Collector for the discharge of the arrears, by two instalments, which he consented to do: he undertook also to pay the R. 2,000 to *Goondoo Sobanadry*, whereupon the proceedings for the sale of the *Mootah* were suspended, and the Respondent continued in possession.

On the 28th *July* 1812, the Respondent executed and delivered to the Appellant, the following *Karar-*

* A small district or subdivision of a country.

proprietor in payment of the instalments. The party becoming security at the same time executed a counter *Kararnamah*, or deed of defeazance, agreeing to give up the *Mootah* when satisfied out of the rents, &c., the principal sum, and interest, which he might advance on account of the security. Default having been made in payment of the first instalment by the proprietor, the guarantee obtained possession of the *Sunud* and *Arzee*; and upon a further default by the proprietor, procured himself to be registered as owner, and obtained possession of the *Mootah*, insisting, notwithstanding the counter *Kararnamah*, that his title was absolute. On a suit brought by the original proprietor for possession of the *Mootah*, and payment of the surplus, after satisfying the advances made on account of the arrears, it was held by the Judicial Committee, affirming the judgment of the Sudder Court, that the transaction was in the nature of a mortgage, and that the party to whom the *Kararnamah* was executed was only entitled to retain possession of the *Mootah* until he had reimbursed himself, out of the rents and profits, the sums advanced by him on account of his security: the counter *Kararnamah*, though not registered, being a valid instrument, and operating as a deed of defeazance to the title acquired under the first agreement.

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namah * :—"There being a balance of R. 31,308 due at the end of *Fusly* 1221 (1811), on my zemindary, called *Cottam Seema*, and an account of Court charges, the collector of the *Zillah* of *Rajahmundry* was about to put the said *Mootah* up for sale, but you having agreed to pay the said balance to the Collector, I caused you to give a *Sunud* † to cause the sum of R. 19,393 to be paid on the 30th *August* 1812, and R. 9,915 on the 30th *September* 1812, to the Collector, and R. 2,000 to be paid to *Goondoo Sobanadry*; and the sale of the *Mootah* having been stopped, I do hereby promise to pay the said rupees to the Collector and to *Goondoo Sobanadry*, according to the instalments aforesaid, and to take and deliver to you the *Sunud* aforesaid. Having fixed the said rupees as the price of the zemindary of the *Cottam Mootah*, in the event of my not observing the above conditions, and agreed that the zemindary should continue under you, and given you a *Putta* ‡ to that effect, and written a letter to the name of the Collector, that he may register and give it to you accordingly, and deposited them in the hands of *Duntaloory Vijia Gopal Raz*; you are to pay the said rupees to the Collector and to *Sobanadry*, and take the said *Putta* and *Arzee* from the said *Vijia Gopal Raz*, and cause it to be registered by the Collector, and enjoy the fruits of the said zemindary from generation to generation for ever, after paying the permanent assessment thereon to the Collector. In the event of my being unable to pay the whole of the rupees, according to the instalments herein inserted, paying only some of the rupees, the

* Deed of agreement. † Deed of assignment.

‡ An instrument in the nature of a lease.

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Zemindary of *Cottam Seema* is to be continued under you, consistently with the writing given by me as aforesaid, and you are therefore only to return to me the rupees which may have been paid by me."

In conformity with the terms stated in the above agreement, the Respondent at the same time executed a permanent *Putta*, of the *Mootah*, to the Appellant, and also an *Arzee*, or memorial addressed to the Collector, requesting that the *Mootah* might be registered in the name of the Appellant. The *Putta* and *Arzee* were deposited in the hands of *Vijia Gopal Raz*, to be delivered by him to the Appellant, in the event of the latter being called upon to pay the sums mentioned in the *Kararnamah*, in order that the Appellant might then obtain the benefit intended to be secured to him, and enter into the possession of the *Mootah*.

On the same day (*viz.*, 28th day of *July* 1812), the Appellant executed and delivered to the Respondent a counter agreement, in the nature of a deed of defeazance, by which the conditional sale of the *Mootah*, as represented by the first agreement, became a mortgage security, for the repayment of whatever sums should be paid by the Appellant on the Respondent's behalf.

This counter agreement was as follows :—" You have caused a *Zamin** to be written by me, to cause you to pay to the collector the sum of R. 29,308 balance, after deducting the payment due on account of the Company's *Beriz*† for *Fusly* 1221 (1811), on your *Zemindary Mootah* of *Cottam*, and the costs of Court, and the sum of R. 2,000 you are indebted to *Goondoo Sobanadry*, altogether R. 31,308. I have taken a

* Security in the nature of a bail-bond. † Government assessment.

Karar Sunud from you, that you should, in the event of your not paying the said rupees, according to the instalments stated in the *Zamin Sunud* executed by me, and of the Collector pressing and taking them from me, make good the amount to me from the *Mootah* of *Cottam*, and having caused a permanent *Putta* respecting the *Mootah* aforesaid, and an *Arzee* to the name of the Collector of this *Zillah*, to be written and deposited by you with *Duntaloory Vijia Gopal Raz*, you are to pay the said rupees to the Collector and *Sobanadry*, upon the instalments stated by me, and take back the three papers executed by you. Should you not discharge the whole amount according to the instalments, I shall retain the *Zemindary* of the *Cottam Mootah* under me, as a mortgage, until you pay the amount, principal and interest, of the rupees which may be paid by me on account of the balance that may remain due, after the payment you may make, and on account of the rupees which you may borrow from individuals, to enable you to make the said payment, as I have agreed to repay them, there being no other property to pay them; and after the said amount of balance is paid to me by means of the profits which may remain, after deducting the Company's *Beriz*, and the necessary *Sebundy** expenses of *Thanadar*,† *Peshcar*,‡ &c., who may be employed on account of the management of the affairs of the said *Mootah*, I shall, without any objection, deliver over to you again your zemindary, the *Cottam Mootah*, and the accounts relative to the management conducted by me, and I will return you the three papers, *viz.*, the *Sunud*, *Putta*, and *Arzee*, which I have obtained from you."

* Military. † Police. ‡Agent.

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The first instalment of R. 19,393, being about to become due, the Collector, on the 25th *August* 1812, sent a written notice to the Appellant, and on the 28th a similar notice to the Respondent, informing them that this instalment must be paid.

The notice sent by the Collector did not reach the Respondent until the 3rd *September*, but having previously paid into the Government treasury R. 3,818, in part of the instalment due on the 31st, he addressed a letter on that day to the Collector, stating that he had already paid part of the money, and was engaged in procuring the rest, and requesting to be allowed ten days further time. On the same day, however, the Appellant drew a bill upon *T. Jagganadha Roydoo*, at fifteen days sight, for R. 15,575, the remainder of the first instalment, in favour of the Collector. This bill was accepted on the 11th of the same month, and paid on the 28th *September* 1812.

Immediately upon this payment, the Appellant, before any further instalment had become due, applied to *Vijia Gopal Raz*, for possession of the *Putta* and *Arzee*, which were delivered over to him.

On the 28th day of *September* 1812, the Collector sent another notice in writing to the Respondent, apprizing him that the second instalment of R. 9,915, would be due on the 30th of that month, and that the money must be paid within that time.

On the 30th *September*, and on various subsequent days, the Respondent paid to the Collector, or to the Government treasury, several sums of money, amounting in the whole to the sum of R. 8,843. 12 a., in respect of the second instalment. Of this instalment the Appellant, on the 26th *October* 1812, paid the sum of R. 1,071. 4 a.

The whole of the sums paid by the Appellant, on account of the above securities, amounted to R. 6,646. 4a. besides R. 1,000, part of the debt due to *Goondoo Sobanadry*, the Respondent having paid the other R. 1,000. The Appellant being, however, in possession of the *Putta* and *Arzee*, procured himself to be registered for the *Mootah*, notwithstanding the remonstrances of the Respondent; and in *December* 1812, entered into possession and receipt of the rents and profits. The Respondent being thus ousted of the possession, and unable to obtain any adjustment of the accounts between him and the Appellant, filed his plaint in the Provincial Court of *Musilipatam*, on the 29th *December* 1814, for the purpose of recovering possession of the *Mootah*, insisting that the Appellant had, by the rents and profits of the *Mootah*, since he had been in possession, been overpaid all the sums paid by him on the Respondent's behalf, and that there was due upon that account to the Respondent the sum of R. 9,699. 12 a., which he sought to recover.

The Appellant by his answer denied the validity of the counter *Kararnamah* on which the Respondent's demand was founded, and insisted that he was entitled to hold the *Mootah* under the terms of the *Kararnamah* executed by the Respondent, and the permanent *Putta* and *Arzee*.

The case, after the usual course of pleadings, came before the Provincial Court for judgment on the 16th day of *April* 1819, when that Court was of opinion, that the question upon which they were to adjudicate, was to be decided solely and exclusively upon the first agreement executed by the Respondent, and that the rights conferred thereby, and

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by the permanent *Putta* and *Arzee*, and could not be affected by any of the other circumstances in evidence: although they observed, that the feelings of the plaintiff must have been highly wrought when he resolved on so extraordinary an act, as to make over, in a manner without reserve, a valuable *Mootah*, under the conditions which appeared to have been so highly advantageous to the contracting party on the one side, and so little profitable to the other. A decree was therefore pronounced in favour of the defendant (the present Appellant), and the Respondent's plaint was dismissed with costs.

From this decree the Respondent appealed to the Sudder Adawlut at *Madras*.

On the 1st of *August* 1822, that Court reversed the decree appealed from, observing that a document had been filed by the plaintiff (the present Respondent), thoroughly to the effect of what he represented to have been the terms of the agreement, and that three of his witnesses had declared it was duly executed: that their depositions agreed as to the time, place, circumstances, and origin of the transaction: that the Provincial Court had founded their decree against the plaintiff solely on his *Kararnamah*.

The Sudder Court were therefore of opinion that the counter *Kararnamah* had been fully proved, and did not perceive any reason in the Provincial Court's rejection of it: and observed that the Respondent having risked his property by appointing it as a security for the Appellant, he obtained by *Kararnamah* the *Mootah* as security for himself, and the present Respondent having granted the *Mootah* as security, obtained by counter *Kararnamah* an assurance that when it had yielded the money due, it should be restored to

him. In this proceeding the Court observed it could discover nothing of an injurious tendency; it was neither more nor less than a mortgage; and though in the eyes of the Collector apparently a sale, it was so only from the necessity of drawing out the *Kararnamah* of resignation according to the settled form. It was obvious that for judgment in this case, the whole of the transaction in question, and not a part of it, should be taken as the ground, and that notice should be bestowed on the intention of the parties, and not on the literal expression of one of their documents, to the exclusion of the rest.

For these reasons, the Sudder Adawlut reversed the decree of the Provincial Court, and adjudged the *Mootah* of *Cottam* to the Respondent, and also the sum claimed by him for damages, together with interest on the whole amount decreed to him, and ordered that the Appellant should pay all the costs in both Courts.

On the 31st of *October* 1822, the Appellant presented to the Sudder Adawlut a petition, praying for a revision of the judgment, and alleging that the Provincial Court had dispensed with the attendance of some of his witnesses whose evidence was material to the cause. Upon this allegation the Sudder Court remitted the cause to the Provincial Court, to receive such further evidence as either party might choose to bring forward. Some further evidence was accordingly entered into, and the cause returned to the Sudder Court.

Upon the return of the additional evidence, the Sudder Court, on the 20th *May* 1824, entered into an examination of the evidence, and reviewed the case as it then stood, and with reference to

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the counter agreement, which the Appellant had sought to impeach as a forgery; when the Court declared that the due execution of that agreement by the Appellant had been satisfactorily proved; and that his signature to it, on comparison with his signature to *Vakalutnamahs*,* and notice for trial, appeared to correspond with each other. The Court, therefore, reversed the decree of the Provincial Court, and adjudged that the Appellant (the present Respondent) should recover possession of the *Mootah*, together with the sum of R. 7,717. 10 a., for damages, and interest, and that the Respondent (the present Appellant) should pay the costs in both Courts.

From this decree the Appellant appealed to His Majesty in Council, praying that it might be reversed, altered, or varied, for the following reasons :—

I. Because the *Mootah* in question became the absolute property of the Appellant, under the terms of a valid contract, of which he performed all the conditions, which were of the essence of the contract.

II. Because it would be unjust to vary or set aside the terms of a contract, deliberately entered into between the parties, and thereby to deprive the Appellant of the only contingent advantage, in respect of which he incurred a certain risk.

III. Because the evidence adduced to impeach the authenticity of the pretended counter *Kararnamah*, upon which the Court below proceeded, was sufficient to lead irresistibly to the inference that it is a fabrication.

The Respondent, however, contended, that the decree appealed from ought to be affirmed for the following reasons :—

* Powers of attorney.

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I. Because the Appellant's counter agreement was clearly proved in evidence, and thereby the effect of the principal agreements constituted one entire transaction, in the nature of a mortgage, the benefit of which was to be realized by perception of the rents and profits of the estate comprised in it.

II. Because it was sufficiently proved by the evidence, that by means of the rents and profits of the *Mootah*, the Appellant had not only repaid himself the whole of his debt, but had received the sum of R. 7,717. 10 a., and upwards, more than was due to him.

Mr. *Miller*, K.C., Mr. *Wigram*, K.C., and Mr. *Jackson*, for the Appellants, cited *Ramsbottom* v. *Parker*.*

Mr. Serjeant *Spankie* and Mr. *E. J. Lloyd*, for the Respondents.

Mr. Justice BOSANQUET:

9 December.

Their Lordships are of opinion that the decree of the Sudder Dewanny Adawlut ought to be affirmed. The facts of the case are very few. It appears that the Respondent being in possession of a *Mootah*, upon which certain dues were owing to the Government, the land was advertised for sale by the authority of the Collector. The Appellant, on the application of the Respondent, was induced to give security for the payment of the duties due to the Government, amounting to about 29,000 rupees, and to take a security for the repayment of that, as well as the repayment of the sum of 2,000 rupees which the Respondent owed to another person, and which he agreed to advance. On this agreement certain instruments were executed con-

* 6 Maddock Rep. 5.

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cerning which there is no question, viz., a *Putta* and *Arzee*, both of which were necessary to authorize the Collector to make a transfer of the property to the Appellant. These instruments are, upon the face of them, such as to authorize the Collector at once to make a transfer of the property, but as it was meant only as a security to a certain extent, the Respondent executed the first *Kararnamah*, by which it was stipulated that if he should not pay the instalments fully, or that any part of them should be in arrear, the zemindary should be continued under the Appellant, consistently with that writing, and that the Appellant should only return to the Respondent the rupees which might have been paid by him. This was very positive undoubtedly: the *Putta* and *Arzee* were deposited with a third person, who was not to give them up to the Appellant for the purpose of enabling him to obtain the transfer of the property, until default should be made according to the agreement. Default was made, the Respondent not paying the whole sum he had engaged to pay, and in consequence of the Appellant having been called upon to pay a portion of the money, the *Putta* and *Arzee* were given up and carried to the Collector, and the transfer of the *Mootah* was made.

Upon the face of this, the Appellant was entitled to retain the property. The value of the property appears, upon the various statements made in the course of this case, to be of a very large amount, in proportion to the sum agreed to be advanced: what the precise amount of it may be is not very material to this transaction, supposing the advance agreed to be made to be very greatly disproportionate to the real value of the property.—I will come presently to what it appears to

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have been,—but admitting this to be a very hard and very oppressive bargain, if nothing else was done, the party in whose favour it was made would be entitled to take advantage of it; but there is one fact, which is stated by the Respondent, though denied by the Appellant, which is, that on the same day another instrument was entered into, by which this plan of a conditional sale, entitling the Appellant to retain the property, provided no default was made, was, in truth, reduced to a mortgage, with a covenant between the Appellant and the Respondent, that whenever he should take possession of the *Mootah*, for the purpose of enabling him to discharge the amount for which he became security, as soon as he should have received out of the rents and profits the sums he had paid, with all expences, he should restore the *Mootah* to the Respondent.

Now we must recollect who the Respondent and Appellant respectively were. The Appellant was the uncle of the Respondent by blood, and also related to him by marriage. The account which is given of the transaction by one of the witnesses, who comes to prove the actual execution of the second instrument, the counter *Kararnamah*, (if he be worthy of credit,) is, that he himself was the writer of the instrument, and having named the witnesses, they were called on the first occasion before the Provincial Court; but this witness not only states that he wrote the counter *Kararnamah*, and those persons attested it, but he says, "after the passing of *Kararnamah* I asked the defendant what advantage there was for him by taking the trouble of writing the *Zamin*. He answered me thus: he is the real son of the eldest sister of my mother, and *Jagganadha Raz*, who is my protector, and has, for the accomplishment of his, the

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plaintiff's business, incurred expences and trouble, and afforded him assistance whereby he obtained a great reputation, and it would tend to my honour if I, although I may suffer great trouble, pay five or six thousand rupees, and preserve the *Mootah* for him, (the plaintiff,) and I have at present caused the *Putta* and *Arzee* to be written and taken, merely in order to be sure, and as soon as the money due to me is paid, I will give back his *Mootah* to him." If that account be true, if this witness is to be believed, that explains the object for which this first *Kararnamah* was given, and if this second *Kararnamah* was given, there can be no question that it was an agreement between these parties, which the Respondent was as much entitled to take advantage of as the Appellant.

The case was brought in the first instance before the Provincial Court, and both those documents were filed. The first *Kararnamah*, together with the *Arzee* and the *Putta*, were filed, and no objection was made to them, consequently they are to be taken as correct. The question then is, whether there has been any thing to take off the effect of the first *Kararnamah* given on behalf of the Appellant. Witnesses were called for the purpose of proving the second *Kararnamah*, the regular ordinary witnesses, that is to say, the person who actually wrote it gives the account of it, and the names of the attesting witness. The Judge of the Provincial Court did not think it necessary to call for further witnesses, for he was of opinion, and he so states in his judgment, that if the first instrument was a good and valid instrument, it follows as a necessary consequence, that whatever transactions may have subsequently occurred, the *Mootah* became the *bonâ fide* property and the right of the defendant. He did not

enter into any question whether there was evidence of that second instrument, and it appears that subsequently he admitted to the Appellant that it was unnecessary for him to call witnesses to rebut the evidence respecting the second *Kararnamah* given on the part of the Respondent.

In that state of things the Respondent appeals to the Sudder Dewanny Adawlut, and the Court having heard the case, argued upon the evidence; the decree of the Provincial Court, as appears to their Lordships, was very properly reversed, because the Court was of opinion, that if that second *Kararnamah* was executed, of which the evidence was plain before the Provincial Court, and was not opposed, that was sufficient to entitle the Respondent to possession in consequence of the whole advances having been discharged out of the profits of the *Mootah*. It is material to observe, that in giving their judgment upon that occasion, they stated the value of this *Mootah* with all the particulars, and how much had been received from it during the time, so as completely to apprize the Respondent of the circumstance of the beneficial property being much greater than the amount of the security which had been given on the part of the Appellant; and then it being represented to them that the witnesses had been stopped on the part of the Appellant, the reply of the Court was, that it was perfectly open to the Appellant to controvert any view taken of the value of this property,—supposing the value to be an important feature in the case,—but the view taken by the Provincial Court was, that the first instrument being executed, whatever might have taken place afterwards, that instrument entitled the Appellant to treat this as a sale, and to hold

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the *Mootah*. It is also to be observed, that in a very early stage of the proceedings, certainly in the reply of the Respondent, it was stated that the *Mootah* which was given as a security for the advance of a sum of about R. 31,000 was worth a lac of rupees, so that the attention of the party had been completely called to that, but he called no witnesses to disprove it, nor does he appear from the beginning to the end to have questioned that fact. In the final decree of the Sudder Dewanny Adawlut, they state that circumstance in detail. In his petition of appeal he does not dispute it, and the objection is now started for the first time, but that representation is not to be relied upon. Their Lordships cannot but think, that this fact, appearing upon the proceedings, taking also into consideration the conduct of all the parties in the suit,—that a *Mootah* of the value stated was professed to be sold by the first *Kararnamah* for about one year and ten months' purchase, certainly a very inadequate price; —that such manifest knowledge of the value of the *Mootah* by all parties is an important feature in the case.

Upon the reply, evidence was adduced for the purpose of impeaching the testimony of those who set up the counter *Kararnamah*, which upon the face of it was legally executed: the Plaintiff, however, produced evidence on the other side to support it. If the case turned entirely upon this, there might possibly be some difficulty in saying where the balance of credit was due, but there is a circumstance then introduced into the case, namely, another instrument, which is adduced for the purpose of rebutting the evidence offered, on the part of the Respondent, of the execution of the counter *Karar-*

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namah, and that transaction, if it really took place, would certainly go very far, if not conclusively to show, that there was a fabrication: I speak here of the receipt by which it is asserted that R. 14,000 which had been paid by the Respondent, and the payment of which sum by him appears to be corroborated by other witnesses on the Respondent's side, was actually repaid by the Appellant to the Respondent, and an instrument upon that occasion taken, in which it is stated, after setting out the whole of the transaction, "I therefore demanded from you the payment of that sum which you have this day paid to me in ready cash: the price of the *Cottam-mootah* has therefore been discharged in full,—I will never make any kind of demand. This receipt has been written and given with my consent." Now, this receipt is said to have been given on the 18th *February* 1823, but it is evident from the proceedings, that the date of 1823, is a mistake, the original transaction took place the 28th *July* 1812, and it appears by a document which has been given in evidence, that in *February* 1813, the precise date does not appear, but by a document filed, and which was read on the part of the Respondent, it appears that in that very month of *February* 1813, an application was made to the Collector, by the Respondent, requesting him to stay his hand, and not to allow the transfer of this property, as being contrary to good faith, and making an objection to the transfer. Is it to be supposed that notwithstanding he was then protesting against the transfer of this property, yet, in this very month of *February* 1813, he executed this receipt, stating the whole transaction, (and thereby putting himself completely out of Court,) that he had received payment of the whole sum he himself

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had advanced, and that he never could make any kind of demand.

In order to prove this instrument, witnesses were called, and, among others, the attesting witness, who could not even tell the particulars of the letters of his own signature, or of the signature of the person who signed it. In respect of not being able to read the letters of a signature of another, that might very possibly be,—he might write a very bad hand, but that he could not tell the letters of his own signature appears very improbable. There are witnesses called on the part of the Respondent, to contradict the circumstance of the R. 14,000 even having been repaid from acknowledgments, on the part of the Appellant, for the purpose of proving that they were paid. The Sudder Adawlut were clearly of opinion that that instrument was a fabrication, and their Lordships concur in that opinion. That being the case it is a very important circumstance, that the main feature of the Appellant's case, which was brought forward for the first time after the case had been sent for review, for the purpose of rebutting the evidence of this second *Kararnamah*, falls to the ground, and that has certainly the effect of cutting down, to a great extent, the attempt on the part of the Appellant to rebut the evidence, which, it must be always recollected, is *primâ facie* legal evidence of the last-mentioned instrument.

Putting that, however, out of view, recollecting that the receipt had never been reverted to in the early part of the proceedings, though it might naturally be expected, when the counter *Kararnamah* was set up, on the part of the Respondent, that the Appellant should come and assert this other document, the conclusive answer is, that the alleged receipt is not brought forward

till the case is sent for review. It is in contradiction also, as I noticed, to the judgment of the Sudder Adawlut. The Appellant insisted that he had paid the whole money to the Collector, whereas now, he admits that it was paid by the Respondent, but then he asserts that he repaid it to him.

We have now to consider whether there is a probability of this second *Kararnamah* having been executed, or whether it is so improbable that it should have been executed, there being *primâ facie* legal proof of it, that their Lordships ought to hold, contrary to the opinion of the Sudder Adawlut, that the instrument is not available. There are two circumstances with respect to probability and improbability; the improbability on one side is said to be this, that this was an absolute sale in the first instance. If, as insisted by the Respondent, it was a conditional sale, which condition is recited in the first *Kararnamah*, why, it is asked by the Appellant, was not the additional condition, by which it was to be held as a mortgage, also inserted in the same instrument? Undoubtedly this is a circumstance which at first strikes one as very improbable, and has great weight with their Lordships in the consideration of this question. But though it is improbable, and appears to be so to their Lordships, it is by no means an impossibility; as, I think, one can conceive circumstances in the case, which were not unlikely to produce that omission, and that I find noticed in the judgment of the Sudder Adawlut. It must never be forgotten, that this is a transaction between near relations; that the object of the Respondent was to prevent the *Mootah*, which appears to have been his paternal inheritance, from being disposed of to strangers by a public sale, and

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he persuades his uncle to become security for him. His uncle requires security, that he shall not be called upon to pay money without the power of reimbursement, and he takes a security which enables him to take possession of the property, provided the instalments shall not be duly and punctually paid, to the amount of the smallest sum, by his nephew, on behalf of whom he makes this advance. Then an instrument is executed to that effect; but it is stated by the witness to whose evidence I have already referred, that the uncle promised to his nephew, that though he took possession of his property, if he should be repaid out of the rents and profits, he would give him back his estate. There is nothing very improbable in the uncle having made that promise to his nephew; and if he did make that promise binding upon him as a private agreement, it is not improbable that he should put it into writing. It is an agreement that would not affect any other person to whom the uncle should transfer the property which he had acquired, but it is an agreement by which as long as he held the property, he would be bound; and the Sudder Adawlut took notice in their judgment that an instrument might have been executed in the common form, which I think they say probably the first *Kararnamah* was, notwithstanding the subsequent instrument. There is some expression of that kind, which leads one to infer, and indeed that is a necessary inference from the proceedings, that the Sudder Adawlut, constituting the judges on the spot, saw nothing in the nature of this transaction so improbable as to induce them to believe it could not have taken place.

It is further to be observed, with respect to the

witnesses by whom the facts are proved that we have not the benefit that the court before whom the question was brought in the first instance, had of seeing the witnesses, and the opinion of the court was given not merely upon the fact of the execution of that *Karar-namah*, but connected with the testimony which had been given.

Such being the circumstances of improbability, which had then full weight with the Court, (though we do not think them unanswerable,) then comes the circumstance of probability on the other side, namely, the value of the property. Now is it at all probable that this property should have been sold, absolutely for less, as it would seem from these proceedings, than two years' value? Supposing it was even three or four years' value, would it not have been extremely improbable that an instrument should have been executed by the nephew to his uncle, transferring the *Mootah* to him out and out, provided he was in arrear in the payment of his instalment to the amount of a single rupee? It is so improbable a transaction, that one should be very much inclined to suppose, that though this instrument was executed for the purpose of enabling the Appellant, the uncle, to have that kind of possession of the property, yet there must have been some promise, that when he should be reimbursed, or if he should pay to a larger amount, or something of that kind, he would restore to his nephew his paternal property. That is probable, and it is also probable that such a promise should be put into writing.

Under these circumstances their Lordships are of opinion that the conclusion to which the Sudder Adawlut came, is correct; that the receipt set up

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for the purpose of rebutting the second *Kararnamah* is a fabrication; that the second *Kararnamah* has been executed, and that consequently effect is to be given to that instrument. The receipt being clearly a fabrication, that, to a certain extent, impeaches the testimony brought forward by the person who sets it up, who is the Appellant, when he brings forward testimony for the purpose of impeaching the credit of the witnesses to the second *Kararnamah*, who state circumstances, which are *primâ facie* legal evidence of the actual making of the instrument by the person who wrote it. The Sudder Adawlut must be the best judges of instruments of this description, and their Lordships are of opinion, that there is no such inconsistency between those two instruments as to make the second an invalid instrument, but treating it therefore as an agreement between the parties, notwithstanding the first instrument may have been deposited, the effect of the transaction is, that the Appellant having reimbursed himself for what he had advanced, out of the rents and profits of the *Mootah*, should restore the estate to his nephew; and if he is to restore the estate to his nephew, he must not only restore the estate but what he has been overpaid; and it does not appear to their Lordships there is any such apparent objection to the amount they have awarded in the Court below, as to furnish an objection, nor does any objection on that ground appear to have been taken in the proceedings on the petition of appeal. Their Lordships, under these circumstances, are of opinion that the decree of the Sudder Dewanny Adawlut must be affirmed, and with costs.

BEEMA SHUNKER, BALCRISHNA, and VENAIK - - - - - - - - - } *Appellants*,

v.

JAMÀS-JEE SHAPOR-JEE, DWARKA HURREE-DAS, PRANWALUB JEWAN RAM, and SORAB-JEE RUSTOM-JEE - } *Respondents*.

On Appeal from the Sudder Dewanny Court of Bombay.

9 December 1837.

THIS was an appeal arising out of a demand made by the Respondents against the Appellants for arrears of fees in respect of certain hereditary offices within the Appellants' *pergunna*.

In the year 1803, the village of *Dindolee*, situate in *Chowrassee pergunna*, in the *Zillah* of *Surat*, was granted by the English Government in *enam* to *Gungadhara Sastri Putwardhun*, the father of the Appellants; at the period of the grant, certain hereditary native revenue officers, forming together an establishment denominated "The Establishment of *Mehta Parek*," (consisting of *Mujmoodars* or general Supervisors of accounts, of a *Parek* or receiver, and of a *Mehta* or registered clerk,) were attached to the *pergunna*; who, by virtue of their respective offices, were entitled to receive certain fees, amounting to the sum of R. 56 monthly, collected from the revenues of the villages.

The offices of *Mujmoodar*, *Parek* and *Mehta* are hereditary, and do not cease upon a grant by the government of a village in *jaghire* or *enam* tenure.—In order to entitle the parties in possession of the offices to the fees incident to them, it is not essential that the duties of the offices should have been performed by the parties so possessed if they were prepared to discharge them if required.—In a suit however for the recovery of the fees, such claim is limited by *Bombay* Reg. V, 1827, s. 4, to a period of twelve years.

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It appeared that from the period of the above grant these fees had not been paid, and the Respondents, who claimed to be entitled to the offices in question, had been to that extent deprived of the profits. Various applications were made to different Collectors of the district, and ultimately to the *Bombay* Government, for an order for the payment of the fees; and on the 1st *February* 1826, the Governor-General in Council, directed that the parties making the claim should sue for their rights in the courts of justice.

In pursuance of this order, the Respondents, (who were the representatives of the parties legally entitled to the offices,) on the 17th *September* 1827, filed their plaint in the Court of the Assistant Judge of the *Zillah* of *Surat* against the Appellants, the sons of *Gungadhara*, to whom the *pergunna* had descended, to recover from them the sum of R. 1,272, being the amount of arrears for twenty-four years of the fees due, at the rate of R. 53 a-year. The plaint was afterwards amended, by stating the yearly amount of fees at R. 56, and claiming as the amount of arrears consequently due from the Appellants the sum of R. 1,344.

The Appellants, by their answer, denied the Plaintiffs' title to the offices, and insisted that, as they had never since the original grant of the *pergunna* demanded the fees of these offices, they could not now recover them; and they moreover insisted that the right of the Plaintiffs was barred by Regulation V, A.D. 1827.

Evidence was entered into on the part of the Plaintiffs only, and on the cause coming on before the Assistant Judge on the 11th day of *September* 1828, he pronounced in favour of the Plaintiffs for the whole

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amount sued for, and directed that the Defendants should pay the costs.

From this decree the Defendants appealed to the Zillah Court. By their supplemental petition of appeal, after insisting on their former defence, they brought forward two new objections, first that the claims of the Plaintiffs were in themselves separate and distinct, and that the plaint uniting them was therefore multifarious; and secondly, that the Plaintiffs had not discharged the duties belonging to their respective offices. To these objections the Plaintiffs replied, that the offices in question constituted one entire establishment, in respect of which there was such an unity in the different parts or portions of the annual sum claimed, as justified the Plaintiffs in bringing forward their claims in the same suit; and they stated that they were always obliged to live in the office at *Chowrassee*, and to perform such business as came before them in that office, and that they took their fees of office from the several villages.

Upon this appeal the Zillah Court required the Collector of *Surat* to give them information upon the particulars contained in the following queries. First, whether when Government gives a village in *jaghire*, the *Jaghiredar* pays *Mujmoodars* and others their rights of office, or whether those rights ceased from the time the village is given in *enam*? Second, whether when a village has been given in *enam* the *Mehtas* and others receive their official dues whether they perform the duties attached to the office or not? The Collector having referred these questions to the *Kamavisdar*,* certified in reply, that when villages were given in

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jaghire, the *Jaghiredars* must pay the hereditary *Mujmoodars*, *Parek*, and *Mehtas*, their yearly dues, and that no hereditary office ceases on a village being given in *jaghire*, but continues as before, and that the *Mujmoodars*, *Parek*, and *Mehtas*, do not go to the villages to perform their duties, but transact all business that comes before them in the office at the head station, and there receive the fees of office.

On the 10th *August* 1829, the Zillah Court of *Surat* made its decree, and declared, that if the Plaintiffs had performed the duties of their office, their claims would have been proved against the Defendants, but that as it was clearly proved that they had not performed those duties for twenty-four years, nor received the dues, such dues did not accrue to them for that period; the senior Assistant Judge's decree was therefore reversed, and the Plaintiffs' claim for arrears disallowed, but their rights as the hereditary officers were established, and it was ordered, that the Defendants should in future employ the Plaintiffs in those duties and pay them their dues, and if they should not call upon them to perform the duties, nor show good reason why they should not employ them, it was declared, that they should nevertheless pay them their fees, and the Plaintiffs were ordered to pay the costs in both Courts.

Both parties appealed from this decree: the present Respondents on the ground that the arrears of fees ought to have been decreed them, and the Appellants that the Respondents' title as hereditary officers had not been proved; and on the 15th day of *December* 1831 the case came before the Puisne Judge of the Sudder Adawlut for decision, when he declared his opinion to be, that by the documents filed by the Plaintiffs it ap-

peared that ill-will had for years existed between the parties, and that the Plaintiffs had been endeavouring to recover their fees without recourse to law; that the Defendants, the present Appellants, withheld them, and therefore did not exact any duty from the Plaintiffs, but that, that was not a sufficient reason why they should not recover them then, or at any rate as much of them as came within the law of limitation, should the Court rule the applications to Government and the Collector of no avail, as not competent authority to decide the claim; and the Judge declared that he was for confirming the decision of the Senior Assistant Judge, and awarding to the Plaintiffs the amount sued for, but as the correctness of that opinion might be questioned in reference to the law of limitation, the case was referred to a full Court.

The appeal accordingly came before a full Court on the 16th *May* 1832, when it was decreed that the Plaintiffs were entitled to recover the fees for the last twelve years, and the *Zillah* Judge's decree was ordered to be amended to that extent, the costs to be borne in proportion to the sum awarded.

From this decree the Appellants appealed to His Majesty in Council, praying that it might be dismissed, and the original decree of the Zillah Court affirmed for the following reasons:—

I. Because there was no evidence of any grant or prescription, conferring an hereditary right to the office of *Mujmoodars*, *Parek* or *Mehta* of the village of *Dindolee*.

II. Because there was no evidence, shewing that the title of any of the Respondents was derived from persons holding the respective offices of *Mujmoodars*,

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Parek or *Mehta*, at the time they alleged that the last payments were made to such officers.

III. Because the Respondents respectively, had not performed the duties of the offices in question during the time for which they claimed arrears; and because by giving no notice of their claim to the Appellants, they had permitted other persons to be employed and paid for the performance of such duties.

IV. Because, if the Respondents had been entitled to the alleged fees, they ought to have demanded them at least annually and were not entitled to recover arrears for twelve years during which the Appellants remained in ignorance of the existence of such a claim.

V. Because the frame and object of the suit was not such as to authorize the Court below, to make any decree with regard to the employment of the Respondent, or the payment of the fees in future; and even if the frame and object of the suit were such as to authorize the Court below to make such a decree, the evidence given on the part of the Respondents was not such as to warrant it in the present case.

On the part of the Respondents, it was contended that the decree appealed from, ought to be affirmed for the following reasons:—

I. Because, independently of the objection raised upon the law of limitation, it was clearly proved that the Respondents were entitled, by virtue of the respective offices held by them, to the sum for the recovery of which they filed their plaint.

II. Because as regarded the right to the offices in question, the time limited by the law of limitations for the institution of a suit had not elapsed at the time of filing the plaint, and by the same law, the claim of the Respondents for arrears of fees, incident to the office,

for the twelve years immediately preceding the institution of the suit, was sustainable.

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Mr. *Miller*, K. C., Mr. *Wigram*, K. C., and Mr. *Jackson* for the Appellants, cited *Merry* v. *Ryves*,* *Foden* v. *Way*.†

Mr. Serjeant *Spankie* and Mr. E. J. *Lloyd*, for the Respondents.

The CHIEF JUDGE of the Court of Bankruptcy: 11 December.

In this case *Jamas-jee Shapor-jee* and *Pramwalub Jewan Ram*, two of the present Respondents, together with *Toojee Ram*, *Mija Ram*, and *Rustom-jee Ruttonjee*, whose interests are represented by the other two Respondents, on the 17th of *September* 1827, commenced a suit in the court of the Assistant Judge in the zillah of *Surat*, against the present Appellants for the recovery of the amount of the arrears of certain hereditary rights of office, alleged to be due to the Plaintiffs from the Appellants.

The Plaintiff's suit was founded upon the allegation that they were the hereditary *Mujmoodars*, *Parek*, and *Mehta* of the *Chowrassee pergunna*, and that the owners of the village *Dindolee* which was situate within the *pergunna*, were bound to pay to the hereditary *Mujmoodars* and their officers, the annual sum of fifty-six rupees; that the village of *Dindolee* had in the year 1803, been granted by the Governor in Council, to *Gungadhara Sastri*, the deceased father of the present Appellants, who succeeded to the village as his heirs, and that neither the father nor the Appellants had paid

* 1 Eden, 7. † 4 Brown, C. C. 525.

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any part of the hereditary or customary dues, the value of which the Plaintiffs claimed in that suit.

The defence set up by the Appellants was in substance first, a denial of the Plaintiffs' title to the hereditary dues claimed by them. Secondly, a claim of redemption from the payment of all customary dues, by virtue of the grant of the village by the government, to the father of the Appellants in *enam*. Thirdly, a denial of the right of the Plaintiffs to recover any of the alleged arrears, on the ground of their never having performed the duties of their several offices in respect of the village of *Dindolee*, since the date of the grant, and that the Appellants and their father, had in consequence employed and paid others to transact those duties. Fourthly, a denial of the Plaintiffs' right to recover under Reg. V, sec. I, of 1827.

The Plaintiffs supported their claim by several documents filed as evidence in the suit, and by the testimony of several witnesses examined on their behalf. The Defendants produced no evidence.

The Assistant Judge on the 11th *September* 1828, pronounced his judgment, and thereby decreed, that the Defendants should pay Plaintiffs, R. 1,344 as the dues of the *Mujmoodars* and others, for 24 years, at R. 56. 1. 0. per annum, and costs.

From this decree the Appellants appealed to the Zillah Court of *Surat*, upon the grounds already enumerated, as their defence before the Assistant Judge.

In this stage of the cause, the grant of *Dindolee* in *enam* to the Appellants' father which had not been given in evidence before the Assistant Judge, was produced by the Collector of *Surat*, which however is wholly silent on the subject of the dues in question,

and certain answers to questions put by the Court to the Collector, were returned and read.

On the 19th *November* 1829, the Zillah Court pronounced its decree, which concludes thus : " It is not here proved, that the *Mujmoodar's* rights are hereditary, but it is well known that the children receive these rights from their father, and that the person doing the duties, receives the fees, and if Government give a village in *Jaghire*, the *Mujmoodar's* rights over it do not lapse; and it is proved beyond all doubt, that the Plaintiffs are the *Mujmoodars* and *Mehtas* of these villages, and if they had performed the duties of their office, their claims would have been proved against the Defendants. But it is clearly proved that the Plaintiffs have not performed the duties of this office for twenty-four years, nor received their dues, which therefore do not accrue to them for that period; therefore after mature deliberation, the senior Assistant Judge's decree is reversed, and the Plaintiffs' claim thrown out, but the Plaintiffs' rights as *Mujmoodars*, and *Mehtas* are decreed to them, and that Defendants should in future employ Plaintiffs in those duties, and pay them their dues, and if they should not call upon them to perform the duties, nor shew good reasons why they should not employ, they shall nevertheless pay them their fees, Plaintiffs paying costs in both Courts."

Against this decrec the present Respondents appealed to the Sudder Dewanny Adawlut at *Bombay*: and the cause came on to be heard on the evidence produced in the Courts below. On the 15th *December* 1831, the sitting puisne Judge gave his opinion to the following effect:—" The trying authority is for confirming the decision of the senior Assistant Judge, and award-

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ing to the Appellants the amount sued for; but as the correctness of this opinion may be questioned, in reference to the law of limitation, the case is referred to a full Court, for the adoption of such mode of disposal as the judges may consider most expedient." And on the 16th *May* 1832, the four Judges pronounced the decree of the Court, viz.—" That the Appellants are entitled to recover fees for the last twelve years, and therefore determines to amend the Judge's decree to that extent. Costs to be borne in proportion to the sum awarded."

From this decree the present appeal has been presented to his late Majesty in Council, and has been referred by Her Majesty to the Lords of the Judicial Committee. On the argument before them, three points were insisted upon by the learned counsel for the Appellants:—

1st, That the Plaintiffs' witnesses had not made out any title to the fees claimed.

2ndly, That the Respondents were not entitled to recover anything, on the ground that they had not performed any of the duties in respect of which the fees were payable.

3rdly, That their claim was barred by the *Bombay* Regulation V of 1827, sec. I; or that, at all events, it should be reduced to the amount of six years arrears, under the third section of that Regulation.

On the other hand, the Respondents insisted that they had clearly made out their claim, and that the Sudder Adawlut, so far from having awarded them more than they were entitled to recover, ought to have confirmed the sentence of the Assistant Judge, and decreed them the arrears of the whole twenty-four years; for that neither the third nor the fourth sec-

tions of the Regulation, relied on by the Appellants, applied to their case.

Their Lordships disposed of the first point during the argument, being satisfied, that although the evidence of the enjoyment of the office was slight, there was nevertheless sufficient, in the absence of all opposing testimony, to show the Respondents title to it, and the receipt of the dues from the village of *Dindolee*, before and down to the grant of the village to the Appellants father, in 1803, and there being no evidence on the other side, which the Appellants might easily have produced, if those fees had been paid to any other party; their Lordships also intimated their opinion, that the grant of the village, in *enam*, by the Government, could not deprive the *Mujmoodars* of their hereditary rights; and agreeing with the Courts below, that it was not essential to the Respondents case, that the duties should have been actually performed, if the Respondents were prepared to discharge them when required; and seeing no reason to doubt the conclusion formed by the Zillah Court, that the Respondents attended at their office according to the ordinary course of practice in such cases; their Lordships confined the argument of the learned counsel for the Respondents to the questions arising out of the *Bombay* Regulations; and after hearing the counsel on both sides, took time to consider their true bearing and effect upon the case before them.

Their Lordships having now fully considered these Regulations, are of opinion that the decree of the Sudder Adawlut is right, and ought to be affirmed. They cannot, however, adopt the view taken by the learned counsel for the Respondents, that the claim of their clients ought to have been extended beyond the

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twelve years, by virtue of the provisions of the first section, for their Lordships think that section is in no way applicable to the present proceeding. The object of that section appears to have been to prevent the title of the actual possessor of any lands, houses, hereditary offices, or other immoveable property, from being questioned, after an uninterrupted possession, as proprietor, for more than thirty years; and if the Appellants had been able to show that some persons other than the plaintiffs had been for more than thirty years in the possession of the office of *Mujmoodar* for this *pergunna*, the title of the possessor might have been set up by the Appellants, in answer to the Respondents claim, otherwise they would have been liable to a double payment. The question then is, whether this case falls within the third or fourth section; for the second section refers to suits for damages for injuries to the person, and for the recovery of privileges of caste, and therefore is obviously wholly inapplicable. The fourth section declares, that in all suits not falling under any of the limitations in the preceding sections of that chapter, it shall be a sufficient defence, that the cause of action arose more than twelve years before the suit was filed.

Unless therefore the Appellants can bring the case within the provisions of the third section, the Sudder Adawlut has rightly decreed to the Respondents the amount of the arrears for the last twelve years. This section provides, that in all civil suits for debts not founded upon or supported by an acknowledgment in writing, and in all suits for damages other than those specified in the preceding section, it shall be sufficient defence, that the cause of action arose more than six years before the suit was filed.

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The question is, whether this is a suit for debt or damages within the meaning of the section, for if it be either the one, or the other (as it clearly does not fall within any of the exceptions), the amount to be recovered must be reduced to the arrears for the last six years. In order to decide this question, it is necessary to bear in mind the foundation of the Respondents claim; it does not rest upon any contract, express or implied, made by the Appellants, to pay the amount sued for, but arises out of a grant, made by the Sovereign proprietor of the territory, of which a part has since been given to the Appellants, by which the possessors of land, within that territory, are bound to contribute, in certain proportions, to the maintenance of certain hereditary officers, created by the grant; imposing an obligation on the officers to perform certain duties, when required; and an obligation on each land owner to pay an annual stipend for the maintenance of the office.

The question is, not whether such an obligation might be enforced, by a suit, in the nature of an action of debt; but whether a claim be constituted in a debt, within the province of this Regulation; and their Lordships are of opinion that it is not. They consider the debt pointed to by this section as confined to demands founded upon the contract of the parties, for the terms of which the Government in India, justly thought it unsafe to rely upon the fading memory of witnesses, beyond the period of six years; neither can this be looked upon as a suit for damages, within the meaning of the Regulations. For the Respondents are not suing for damages, sustained by them in consequence of any tortious interference with the hereditary rights, or for any breach of contract by

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the Appellants, but seek in this suit to recover the payment of the specific sums granted to them, in respect of the lands occupied by the Appellants, and their Lordships are of opinion that the Judges of the Sudder Adawlut were right in applying the fourth section of the Regulations to this case; and will advise Her Majesty to affirm their decree and to dismiss this appeal with costs.

EDWARD BRIDGEMAN MILLS, (Collector of Kaira) - - - - - - - } *Appellant,*

v.

MODEE PESTON-JEE KHOORSED-JEE - *Respondent.**

On Appeal from the Sudder Dewanny Court of Bombay.

22, 23, & 26 June 1838.

A village having been granted in *Enam* by the *Peishwa* of the *Deccan*, was after the death of the grantee seized by the *Mamlutdar*, or farmer of the revenues, for an alleged debt due to him, and retained until the treaty of *Poona* in 1818, when it came into the possession of the British Government. On a suit instituted by the representatives of the original grantee, for possession of the village, and payment of the arrears of revenue so sequestered, it was held by the Judicial Committee affirming the decree of the Provincial and Sudder Courts, that the original resumption was a wrongful act of an individual, and not an act of the State; the British Government were therefore ordered to restore the village, but, pursuant to Reg. V of 1827, sec. 3, with only six years arrears of revenue.

Semble.—The right of a party to institute a suit as heir of the original grantee, not having been disputed in the Courts below, cannot be questioned before the Judicial Committee.

THIS was a claim made by the Respondent against the British Government in *India*, to the village of *Rawlej*, and the revenue arising therefrom, from the period when it had been taken possession of, under the following circumstances:—

In the year 1803, *Bajee Row Pundit*, the *Peishwa* of the *Deccan*, granted by *Sunud*, to *Khoorsed-jee Vullud Jemset-jee*, his heirs and successors, in perpetuity, the village of *Nawapoora*, otherwise called

* Present: Members of the *Judicial Committee*,—Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, the Right Hon. Thomas Erskine, Chief Judge of the Bankruptcy Court.

Privy Councillors,—*Assessors*, Sir Edward Hyde East, Bart., Sir Alexander Johnston, Knt.

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Rawlej, situate in the *Talook* or district of *Ahmedabad*, in the province of *Guzerat*, to be held as an *Enam** village.

By virtue of the above *Sunud*, *Khoorsed-jee* entered and continued in possession of the village, and in the receipt of its revenues, until the month of *February* 1815, when he died, leaving a daughter (who was married to the Respondent), but no male issue; when the right of succession to his estate, according to the laws and customs of the *Parsee* caste, (to which he belonged), devolved to, and vested in, the Respondent, as his nephew and heir.

Immediately on the death of *Khoorsed-jee*, *Trimbuck-jee Danglia*, who then held the office of *Mamlutdar*, or farmer of the revenues of *Ahmedabad*, under an appointment from the *Peishwa*, on the allegation that a considerable sum of money was due to him from *Khoorsed-jee* as the balance of pecuniary dealings between them, seized and took possession of the village of *Rawlej*; no *Sunud* or order was previously issued from the *Peishwa*, authorizing such resumption, nor was it proved that *Trimbuck-jee* was the *Sursoobadah*† of *Ahmedabad*, or invested with the *Mootalikee Sicca* (or delegated seal of state), or that he had any right or power as *Mamlutdar*, to effect such resumption without a *Sunud*, or order from the *Peishwa*. After its seizure, the revenues of the village of *Rawlej* were not carried by *Trimbuck-jee* to the account or credit of the *Peishwa's* government, but were appropriated by him to his own private use and benefit.

* Land free of rent.

† Governor of the province.

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Shortly after the seizure of the village, the Respondent, as the heir of *Khoorsed-jee*, petitioned the *Peishwa's* government for its restoration: petitions were also presented by other members of *Khoorsed-jee's* family, between whom and the Respondent some misunderstanding arose in regard to the right of succession to *Khoorsed-jee's* estate, which was referred to *Moro Dicksit*, an officer in the *Peishwa's* service, for adjudication.

In the year 1816, (the year ensuing the seizure of the village of *Rawlej*,) *Trimbuck-jee* ceased to be *Mamlutdar* of *Ahmedabad*, and the *Mamlut* was transferred from him to *Lakshman Ramchunder Nugurkur*, who acted as *Mamlutdar* of *Ahmedabad* until 1817, when the *Mamlut* was transferred under a *Sunud* from the *Peishwa* to *Annunt Row Guicowar*. It appeared from the *Dufters* or records of the *Peishwa's* government, kept at *Poona*, that the village of *Rawlej*, subsequently to its seizure by *Trimbuck-jee*, was entered in those records as the *Enam* of *Khoorsed-jee*, and that it so remained entered up to the time that the British Government took possession of *Poona* in 1818.

In the latter end of 1817, while the disputes between the Respondent and the other members of his family were in course of adjustment, the war between the *Peishwa* and the British Government broke out, which terminated in 1818, in the conquest of the *Peishwa*, and the cession of his dominions to the British Government, in which cession (amongst the other possessions) was included the *Mamlut* of *Ahmedabad*, comprising the village of *Rawlej*, the inheritance of the Respondent.

Shortly after the dominions of the *Peishwa* had been

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ceded to the British power, Mr. *Elphinstone*, who was appointed by the Government, Commissioner for the settlement of the affairs of the *Deccan*, instituted an inquiry into the claims of the *Enamdars* of the late *Peishwa's* government to *Enam* villages, and in the course of such inquiry, he framed from the *Dufters* or records of the government at *Poona*, a list of all such villages, as, during the existence of the *Peishwa's* rule, were considered and treated, as held in *Enam*. In the list so framed, the village of *Rawlej* was (amongst others) inserted as an *Enam* village, and was described as the property of *Khoorsed-jee*.

The continuance of the disputes in regard to the right of succession to *Khoorsed-jee's* estate, and the disturbed and unsettled state of the country consequent on the conquest of *Poona*, prevented him from asserting his claim to the village, on the dominions of the *Peishwa* coming under the British rule. Those disputes were not finally adjusted until the year 1823, when the *Punchayet* * to whom the matter in issue had been referred, decided in favour of the Respondent's claim, declaring him to be the legal successor and heir of *Khoorsed-jee*. Upon the decision of the *Punchayet*, the Respondent was put in possession of the *Sunuds* and title-deeds of the village of *Rawlej*, and being then in a situation to assert his claim, he forthwith presented a petition to the Government, claiming to be entitled to the village, and praying that it might be restored to him.

The claim was in the first instance referred by the Government to the then Collector of *Kaira*, Mr.

* Court of arbitration.

Williamson, who instituted an inquiry into it, and reported the result of his inquiry in a letter dated the 12th of *July* 1827, together with the evidence on which his report was founded. Upon this report the *Bombay* Government refused to admit the Respondent's right to the village, alleging that it appeared from the *Poona* records that *Trimbuck-jee* was at the head of the *Poona* administration at the time the sequestration of *Rawlej* took place, and that his acts were virtually those of the Government, and moreover that he was a *Sursoobadah*, and entitled to make such resumptions.

The Respondent again petitioned the Government, stating various facts to show that *Trimbuck-jee* was not the principal Minister of the *Peishwa*, nor at the head of his administration at *Poona*, nor a *Sursoobadah*, and that the village of *Rawlej* had been attached by him without the previous authority or subsequent concurrence of the *Peishwa*. In answer to the above petition, the Respondent received from the Secretary to Government a letter, dated the 10th of *November* 1827, informing him "that rules regarding the resumption of *Enams* were laid down with great precision in the Code of Regulations, and that if the Respondent thought they had been infringed upon in his instance, he should apply to the Courts of Justice for redress."

Accordingly on the 22nd day of *March* 1828, the Respondent filed his plaint in the Zillah Court of *Ahmedabad* against the Collector of Kaira, as the representative of the Bombay Government, claiming the restoration of the village of *Rawlej*, and the sum of R. 110,000, in respect of the revenue of the village,

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for eleven years previous to the institution of the suit.

To the above plaint the Collector put in his answer on the 1st *October* 1828, not questioning the title of the Respondent, as the heir of *Khoorsed-jee*, but insisting that the attachment of *Rawlej* was a valid attachment on the ground, First,—that it had always been the custom of the *Peishwa* and *Guicowar's** Government, to call that man *Sursoobadah* who held the *Mootalikee* seal, and that as *Trimbuck-jee* held the *Mootalikee* seal, on that account he was called the *Sursoobadah*; Secondly,—that from the year *Sumvit* 1871 (A.D. 1815-16), when *Trimbuck-jee* seized the village of *Rawlej*, until 1873 (A.D. 1816-17), the *Peishwa's* Government received the revenues of the village, and after that, in *Sumvit* 1874 (A.D. 1817-18), the revenues of the village were received by the *Guicowar*; and Thirdly,—that *Trimbuck-jee* was one of the *Peishwa's* ministers, and that what he did was the act of the *Peishwa*.

To this answer the Respondent replied on the 24th *November* following, traversing the grounds insisted on by the Appellant in his answer in support of the validity of the attachment of *Rawlej*, and on the 5th *March* 1829, the Appellant filed his rejoinder to the Respondent's replication, and thereupon issue was joined between the parties.

On the 24th *March* 1829 the cause came on to be heard before *Edward Grant*, Esq., Judge of the Zillah Court of *Ahmedabad*, and on the 8th of *August* following the Court declared its opinion to be, "that the whole

* The *Mahratta* chieftain of *Baroda*.

of the Respondent's demand was just and true, and adjudged that the Collector of *Kaira* should deliver over the village of *Rawlej* to the Respondent, together with the revenue of the village for eleven years, amounting to one lac and ten thousand rupees, and that all costs of suit should be borne by the Collector."

From this the Collector appealed to the Sudder Dewanny Adawlut at *Bombay*. In his petition of appeal, in addition to the several objections advanced by him in the pleadings in the Court below as an answer to the Respondent's claim, he, for the first time, and as a new ground of defence, insisted that as *Khoorsed-jee* left no male issue, and died without ever adopting the Respondent as his heir, the village of *Rawlej*, according to the custom of the country, reverted on the death of *Khoorsed-jee* to the *Peishwa*, and that it was sequestered by *Trimbuck-jee* for want of issue of *Khoorsed-jee*. The Collector adduced no evidence in support of such alleged custom, nor in disproof of the fact of the Respondent being the heir of *Khoorsed-jee*.

The appeal came on for hearing in the first instance before the sitting judge of the Sudder Dewanny Adawlut, (*Edward Ironside*, Esq.) on the 6th *October* 1831, and was by him referred to a full court, before whom it was again heard on the 22nd of *November* 1832, and several successive days; and, on the 31st of *December* 1832, that Court made their final decree, wherein they stated, that, having maturely weighed and considered the evidence adduced in favour of the respective parties, they found that the Respondent *Modee Peston-jee* was acknowledged in the *Peishwa's* records as successor to *Khoorsed-jee*, and had been held

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as such in various lawsuits, and in dealings with the community at large, and that at the death of *Khoorsed-jee* a form applicable to the occasion of succession was gone through: they were therefore of opinion, that the Respondent's right to succeed as heir was established. That finding, moreover, that *Trimbuck-jee* was clearly proved to have possessed no authority of resumption in the district wherein the contested land was situated, and that the mere act of resumption therefore established no right in the Revenue Department, and that in the records procured from the agent for the Government at *Poona*, and that day read, it was substantiated, that the Respondent was recognized as rightfully holding the exempted land so long as the *Peishwa*, and after him the British authority of the *Deccan* Commissioner existed, and that this extended to within ten years of the suit being instituted, the Court were of opinion, and decided, that there was no presumptive or prescriptive reason for withholding the land from the Respondent. But as by Regulation V, A.D. 1827, section III, money debts, unsupported by written acknowledgments, were not recoverable after six years, and the Court considered the arrears of annual proceeds of this land could not be considered in any other light, it determined that only the proceeds of the six years previous to the suit being instituted could be awarded to the Respondent. In the terms of which opinion judgment was accordingly given in favour of the Respondent, and the Judge's decree, dated *August* 8th, 1829, amended: proportional costs being to be borne by the parties.

From this decree the Appellant appealed to the King in Council, praying that the decree of the Zillah and

Sudder Dewanny Courts might be dismissed for the following reasons :—

I. Because the Appellant adduced no proof of his alleged adoption, or of his being heir to *Khoorsed-jee*.

II. Because the village of *Rawlej* was legally resumed under the Government of the *Peishwa*, and was treated as a Government village before, and at the time when the territory to which it is situate became part of the British dominions.

III. Because the grant to *Khoorsed-jee* was of a nature which the Government had a legal competence to resume, and although the Government had, by a legislative act qualified and restrained its legal competence, the Respondent could only avail himself of that act by bringing himself strictly within its provisions, which he wholly failed to do.

IV. Because the village of *Rawlej* had been assessed to the public revenue for twelve years next before the institution of the present or any other suit, alleging a title to exemption, and there was no recognition of such title subsequent to the resumption insisted upon by the Appellant, either by the present or any former Government, or by any public officer under them possessed of competent authority.

V. Because the Appellant was prevented by the conduct of the Courts below from adducing evidence in support of the right of Government to the revenue of the village of *Rawlej*.

On the part of the Respondents, it was contended that the decree appealed from, ought to be affirmed for the following reasons :—

I. Because the village of *Rawlej* was attached by

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Trimbuck-jee arbitrarily and unjustly, on his own private account, and with a view to his own personal aggrandisement, and not on account of the *Peishwa*, or the *Peishwa's* Government.

II. Because by the established laws and usages of the *Peishwa's* dominions no *Enam* village could be attached, except under the authority of a *Sunud* previously issued by the *Peishwa*, or unless the party attaching was a *Sursoobadah*, and invested with the *Mootalikee* seal; and because in the instance of the attachment of *Rawlej* no such *Sunud* had, in fact, issued, nor was *Trimbuck-jee* a *Sursoobadah* of that district, and was not invested with the *Mootalikee* seal.

III. Because the village of *Rawlej*, after it had been attached, was not entered by *Trimbuck-jee* in the Government accounts as an attached village, nor were its revenues carried by him to the credit of the Government in any such accounts; on the contrary, they appeared to have been clandestinely and fraudulently appropriated by him to his own use and benefit.

Mr. Serjeant *Spankie*, Mr. *Wigram*, Q. C., and Mr. *E. J. Lloyd*, for the Appellant,

Contended that the original grant having been to *Khoorsed-jee*, " to be enjoyed by him, his family and issue for ever," was equivalent to a limitation to him and his heirs lawfully begotten, and was in fact a grant in tail male,—that having only female issue the lands reverted to the *Peishwa*, whose territory being ceded in 1818 to the British Government, their title was indefeasable,—that the Provincial and Sudder Courts ought to have insisted on the same proofs of

descent as would be required in a pedigree case here, and that there being no such proof, and no evidence of adoption, the suit ought to have been dismissed;—that even if adoption had been proved, there was no evidence that such adoption had been with the consent of the Government as is essential in all gifts in *Enam*, and they insisted that *Trimbuck-jee* being *Mamlutdar*, must be assumed to have had the *Mootalikee* seal, without which he could not exercise the authority of his office, and that having such authority he was fully qualified to resume the grant of the village in question, and contended that the Respondent's right never having been recognised by the *Peishwa's* Government, his claim, even if he succeeded in establishing his descent or adoption, would be barred by the Limitation of Suits' Regulation.

Dr. *Lushington*, Mr. *A. Lewis*, and Mr. *Montague E. Smith*, for the Respondent,

Maintained that the Respondent's title never having been questioned in either of the Courts below, it was not competent for the Government to raise an objection on that ground now;—that, in fact, the Government, by their letter of the 10th *November* 1827, in reply to the petition of the Respondent, had recognized and admitted his right to sue as the representative of *Khoorsed-jee*, and that even if such recognition were not conclusive, they had sufficient notice of the character in which he claimed to have induced them to put him to the proof of his title, if they had entertained any doubt upon the subject. That it was not proved that *Trimbuck-jee* ever was *Sursoobadah*, or held the *Mootalikee* seal; and though the resumption of the land under such circumstances

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would have been illegal, yet that in the absence of all colour of authority, such resumption was absolutely void *ab initio*. They contended also, that the Respondent's claim, if affected by the Limitation of Suits Regulation, was only so to the extent of confining the claim of arrears to the period awarded by the Sudder Court.

Mr. Justice BOSANQUET:—

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The Respondent in this case commenced a suit in *March* 1828, in the *Zillah* Court of *Ahmedabad*, to recover from the Appellant, the Collector of *Kaira*, the possession of the village of *Rawlej*, in the *Petlad Pergunna*, in the *Talook* of *Ahmedabad*, to which he claimed to be entitled as representing his uncle *Khoorsed-jee Jemset-jee*, of the value of R. 1,00,000, together with the revenue for eleven years, amounting to R. 1,10,000.

This village had been granted in 1803, by the *Peishwa*, in *Enam*, to the late *Khoorsed-jee*, and had been enjoyed by him till his death in 1814. Soon after which, *Trimbuck-jee*, who was minister of the *Peishwa*, and resided at *Poona*, caused the village to be sequestered, and took the revenues.

At the time of this sequestration, *Trimbuck-jee* was *Mamlutdar*, or farmer of the *Talook* of *Ahmedabad*. In 1815, he was displaced, and deprived of all his offices; and the *Mamlut* of *Ahmedabad* was conferred by the *Peishwa* upon *Lakshman Ramchunder Nugurkur*. It was afterwards, in consequence of the treaty of *Poona* in 1817, granted in perpetuity to the *Guicowar*, who, by the treaty of *Baroda*, 6th *November* 1817, assigned it to the East India Company. All the right of the *Peishwa* against

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the East India Company, as *Mamlutdar*, or farmer, of *Ahmedabad*, having ceased by his declaration of war, and consequent subjugation of his territories, and surrender of himself, the Government of the East India Company took possession of the village of *Rawlej*, and collected the revenues for its own use, from 1817, to the commencement of the suit.

The material question in the case is, whether by the sequestration of the village in 1814, the *Enam* grant made by the *Peishwa* to *Khoorsed-jee Vullud Jemset-jee* in 1803 was put an end to, or whether the representative of *Khoorsed-jee*, though deprived of the enjoyment of the revenues by *Trimbuck-jee*, did not continue, till the deposition of the *Peishwa*, to be treated by him as *Enamdar*, and was *de jure Enamdar* of the village. If the *Enam* grant was actually revoked by the sequestration which took place in the time of the *Peishwa*, the Government of the East India Company would be entitled to take advantage of such revocation; but if the grant subsisted at the time of the conquest, the representative of the grantee would be entitled to demand the restoration of the village. On the one side it is asserted that *Trimbuck-jee*, by virtue of his office, either as minister of the *Peishwa*, or as *Sursoobadar* of the *Talook* of *Ahmedabad*, or as the holder of a certain seal, called the *Mootalikee* seal, was authorised to revoke the grant, although no *Sunud* or order of the *Peishwa* may have been received by him for that purpose: that his act must be taken to be the act of the *Peishwa*, his sovereign; that the village of *Rawlej* was specified in the accounts of the *Petlad Pergunna*, in the *Talook* of *Ahmedabad*, which was under *Trimbuck-jee*; and, consequently, that his receipt of the revenue must be considered as the

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receipt of the Government, by which receipt the revocation would be confirmed, though not made in pursuance of any previous *Sunud*. On the other hand it is insisted, that although *Trimbuck-jee* was the minister of the *Peishwa*, and was *Sursoobadar* of six specified *Mahals* or revenue districts in *Guzerat*, belonging to the *Peishwa*, and might as such have the *Mootalikee* seal within those districts, he was not *Sursoobadar* of *Ahmedabad*, nor entrusted with the *Mootalikee* seal there; without which he had no power to revoke; that he was only *Mamlutdar* or farmer of the revenues of *Ahmedabad*, under an express grant of that office, which was inconsistent with the superior authority of *Sursoobadar*; that the *Enam* villages were excluded from the *Mamlut* of *Ahmedabad*, and the village of *Rawlej* entered in the accounts in a different form, from that of the places subject to the payment of revenue; that no *Sunud* of the *Peishwa* was ever issued to authorize the revocation, nor was the revenue of the village ever carried to the account of the *Peishwa*. Upon all these points, each party has relied upon such parts of the evidence as appeared to support his view of the case.

The Zillah Court and Sudder Dewanny Adawlut have concurred in pronouncing their opinion that the authority of *Trimbuck-jee* to revoke the grant was not established.

Their Lordships have considered the evidence and the arguments urged on behalf of the respective parties; and as they agree in the view which has been taken of the result of the evidence by both the Courts below, they deem it unnecessary to enter into a particular examination of it, for the purpose of confirming the opinion pronounced by those Courts.

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Their Lordships being of opinion that the *Enam* grant continued in force until the deposition of the *Peishwa*, and that the seizure of the revenue by *Trimbuck-jee*, and consequent dispossession of the representative of *Khoorsed-jee*, was the wrongful act of an individual, and not an act of the State, the objection to the Respondent's recovery, on the ground of limitation of time, does not arise, since the village has not been assessed for the benefit of the State for the period of twelve years.

Another objection to the Respondent's recovery has been made, namely, that he has not proved himself to be the heir of the late *Enamdar*. But it does not appear to their Lordships that his heirship has been put in issue. The claim made in the plaint is the right to sue for an hereditary village, which the Plaintiff's father received in *Enam*, and is thus stated,— "The village of *Rawlej*, in the *turruf* of *Kutthona*, in the *Petlad Pergunna*, in the *Ahmedabad Talook*, was first given to your petitioner's father, who was servant to the *Peishwa*, *Dada Sahed*, when at *Cambay*, or any other place, on which account he gave to my late father an hereditary *Sunud*, from the *Peishwa's durbar*, in the year 1202 (corresponding with A.D. 1803), providing that he and his heirs for ever should enjoy the revenue."

The Appellant, in his answer to the plaint, alleges five grounds of defence, but in no one does he deny that the deceased *Enamdar* was the uncle of the Respondent, or that the Respondent is entitled to sue as his heir. Their Lordships, therefore, do not think it competent to the Appellant to object to a deficiency of proof upon this subject; and they would very much

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regret if the pleadings had required them to give effect to such an objection.

It appears from the evidence that after disputes among the family of the deceased, the right of representation was agreed to belong to the Respondent; and it further appears, that he was acknowledged and treated by the *Peishwa* as the successor of the deceased.

In *July* 1824, the Respondent presented a petition to the Collector, complaining of his being dispossessed of the village, in consequence of which inquiries upon the subject were made by the British Government; and in *August* 1827, the Collector was informed that the claim of the Respondent was inadmissible. On the 31st *October* 1827, the Respondent preferred his petition to the Government, and on the 10th *November* in the same year, was referred to the rules respecting the resumption of *Enams*, and told that if he thought them infringed, he should apply to the Courts of Justice for redress.

In *March* 1828, he commenced his suit against the Collector of *Kaira*, who put in his answer on the 1st *October* in that year. After these proceedings had been taken, the Collector, by a letter from the Government of the 9th *April* 1829, is informed "that in defending the suit he is at liberty to use such arguments as he may deem necessary, but the strength of the defence must rest upon the fact of the resumption having taken place before the British Government obtained possession of the *Petlad Pergunna*, and having been made by *Trimbuck-jee*, who as *Sursoobadah* of the *Peishwa's* share of *Guzerat* was quite competent to do this act."

It is evident, therefore, that the Government did not contemplate any defence, either upon the ground of limitation of time, or the want of proof that the Respondent was heir to the deceased *Enamdar*.

The Sudder Dewanny Adawlut has very properly restrained the recovery of the revenue to six years, the liability to refund the money received being a money debt.

Their Lordships will therefore recommend Her Majesty to affirm the decree of the Sudder Adawlut, with costs, to be paid by the Appellant.

MULRAZ LACHMIA, Widow - - - - *Appellant*,

v.

CHALEKANY VENCATA RAMA JAGGANADHA ROW - - - - - - - *Respondent.**

On Appeal from the Sudder Dewanny Adawlut of Madras.

30 June 1838.

By the *Hindoo* law, a *Zemindar* having no issue is capable of alienating, by Deed or Will, a portion of his estate, which, in default of lineal male issue and intestacy, would rest in his wife; without her consent.

Semble.—A Will established in a former suit cannot be impeached in a subsequent suit brought by the same party.

THE question involved in this case was the validity, by the *Hindoo* law, of a devise made in confirmation of a previous gift, by a man having no lineal male heirs, in prejudice of his wife, in whom the succession vested, in case of no alienation and intestacy.

Rajah Mulraz Vencata Goonda Row, the husband of the Appellant, was the proprietor of the *Lakhiraj* village *Somavaram*, in the *Nozeed Zemindary*. By his Will, dated 11th March 1811, he constituted a person named *Mulla Row* his *Kurta*,† for certain purposes therein defined, and, as he stated, "for the purpose of continuing permanently to his relative *Chalekany Jagganadha Row* (the Respondent) the village of *Somavaram*, which I have already transferred to him for his maintenance."

† Manager of his property, a sort of executor.

* Present: Members of the *Judicial Committee*,—Lord Brougham, Baron Parke, Mr. Justice Bosanquet, Sir Thomas Erskine Chief Judge of the Court of Bankruptcy, and Sir John Nicholl.

o Privy Councillors,—*Assessors*, Sir Edward Hyde East, Bart., Sir Alexander Johnston, Knt.

The *Rajah* died in 1819 without issue, leaving the Appellant, his Widow, surviving. In 1820, the Appellant, as such widow, commenced a suit in the Provincial Court for the Northern Division, against *Mulla Row*, for the possession of the whole of her late husband's estate, and obtained a decree, which was confirmed in 1824 by the Sudder Court, establishing the Will of the *Rajah*, and declaring her entitled, as the Widow, to the whole of his estates not specifically bequeathed.

In *January* 1827, nearly eight years after the *Rajah's* death, and three years after the decree in the above suit, the Appellant filed her plaint in the Provincial Court for the Northern Division, for recovery of the village *Somavaram* from the Respondent, alleging, notwithstanding the devise and recognition of the Respondent's possession in the Will, that a *Sunud* or deed of gift which constituted his original title, was a forgery; that the village, being held for police duties, was not transferable for maintenance, and that the Respondent's omission to report the transfer to any public authority, as well as a correspondence in April 1818, subsequent to the date of the alleged transfer, that had taken place between the late *Rajah* and the Collector, was evidence that no such transfer had been made. The Appellant also insisted, that her late husband was not competent by law to alienate the village by his Will without the consent of the Appellant, as his heir.

The Respondent, by his answer to the plaint, insisted upon his rights under the deed of gift, and the Will of the *Rajah* confirming the gift. In proof of the Will and its validity, he referred to the records of the Provincial Court in the suit above-men-

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tioned, and to the decree of the Sudder Court upon appeal.

The parties having filed their reply and rejoinder, the Provincial Court deemed it unnecessary to summon witnesses, and, on the 21st *March* 1828, by its decree, dismissed the Plaintiff's claim, with costs.

Against this decree, the Appellant appealed to the Sudder Adawlut at *Madras*, and in her special grounds of appeal, submitted and insisted that the gift by the Will was at variance with the Respondent's claim under a prior gift by grant, that the *Sunud* relied upon by the Respondent must be a forgery, and that the terms of the Will, whereby the village was given to the Respondent, were inconsistent, and that the gift was void on that account.

The Sudder Adawlut were of opinion, having regard to the Will of the late *Rajah*, and to its own decree in the Appeal of 1824, whereby the validity of the Will was established, that the fact of the alienation of the village to the Respondent was unquestionable, and that the Appellant's title to recover the village depended exclusively upon her husband's competency to alienate.

For the purpose of obtaining an exposition of the law on this point, the Court put the following question to their *Hindoo* law-officers:

"You are required to state whether, according to the *Hindoo* law, a man possessing large ancestral landed estates and other property to a considerable amount, the succession to which in default of lineal male heirs vests in his wife, is competent, without the consent of his wife, to alienate in perpetuity to one of his nearest male relations, a village which he had acquired by purchase at a public auction.

" You will cite at length the authorities on which your answer is grounded."

To this question the *Hindoo* law-officers returned the following answer:

" It is declared in the *Dhurma Sastra*, that a man may give what remains after a sufficient property is retained for the suitable maintenance of the family, such as food, raiment, &c.: therefore, if the ancestral landed estates and other property of the person mentioned in the question, who is destitute of male heirs, be sufficient for the suitable maintenance of his wife and family, he is competent, without the consent of his wife, to alienate in perpetuity to one of his nearest male relations, a village which he had acquired by purchase at a public auction.

" Authority.—Text of *Vrihaspati*, in the chapter of *Datta Pradanika*, in the law-book *Smriti, Chandrika*, &c.: 'A man may give what remains after the food and clothing of his family.'—Text of *Nareda*: 'What exceeds the maintenance of the family may be given away.'—Text of *Yagnyawalkya*: 'A gift made without prejudice to the family is valid.' "

It appearing from the foregoing answer that the Appellant's husband was fully competent to alienate the village, the Sudder Adawlut, by its decree dated the 18th *November* 1830, affirmed the decree of the Provincial Court, and dismissed the appeal therefrom with costs.

From both these decrees, the Appellant appealed to his Majesty in Council, praying that the decree of the Sudder Dewanny Adawlut might be reversed for the following reasons:

I. Because, the Courts below acted irregularly

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and unjustly, in refusing to receive relevant evidence tendered by the Appellant, and in founding their decree upon alleged facts, which neither appeared on the record, nor bound either of the parties in the suit.

II. Because the opinion of the *Hindoo* law-officers which was the foundation of the Decree of the Sudder Adawlut, was given upon an erroneous and imperfect statement of the case.

The Respondent, on the other hand, submitted that the appeal ought to be dismissed and the decree affirmed for the following reason:—

Because the Will of the late *Rajah*, the validity of which had been previously established by decree, contained, in the clause set forth, a clear and unequivocal gift of the village to the Respondent; and the competency of the testator to make that gift without the consent of the Appellant, his heir, was unquestionable.

Mr. *Miller*, Q. C., Mr. *Wigram*, Q. C., and Mr. *Jackson*, for the Appellant.

Mr. Serjeant *Spankie*, and Mr. *E. J. Lloyd*, for the Respondent.

Mr. Baron PARKE:

Their Lordships deem it unnecessary to call on the Respondent's counsel; the only question is, whether the late *Rajah* was capable of alienating the property in question, it being part of his *Zemindary*, or whether his wife, the Appellant, was entitled by the *Hindoo* law to the whole of the *Zemindary* for her provision. The Sudder Court examined the *Hindoo* law-officers

on that point, and their opinion was clearly in favour of the *Rajah's* right to make such alienation: that Court thought the Will sufficiently proved in the former suit, and, upon the authority of the *Hindoo* law, dismissed the appeal: their Lordships agree in their decision, and think the judgment of that Court must be affirmed with costs.

PANDOORUNG BULLAL PUNDIT - - - *Appellant*,

v.

BALKRISHEN HURBA-JEE MAHAJUN - *Respondent*.*

On Appeal from the Sudder Dewanny Adawlut, Bombay.

30 November 1838.

A petition having been presented to prevent the sale of a house and premises under attachment, in satisfaction of a Decree, on the ground that the owner was an infant, and unrepresented in Court; and an order made thereon for the production of the evidence in support of those facts. the petitioner, not having produced such evidence, and the sale being about to take place, filed a plaint, claiming the premises in question on his own account, as equitable mortgagee; but having failed in proving either the transfer or payment of the alleged mortgage, the Sudder Court dismissed his suit, and their decree was affirmed, but without costs, upon appeal to His Majesty in Council.

THE Respondent, *Balkrishen Hurba-Jee Mahajun*, an inhabitant of the *Sudasew-Pet*, obtained a decree in the Court of the Senior Assistant Judge of the *Zirkan* of *Poonah*, on the 13th *January* 1829, against *Wasdeo Jenardhun Khandeykur*, an inhabitant of the same *Pet*, for R. 1,134. 7½; and default having been made, he caused a mansion-house in the *Sunwan-Pet*, belonging to the defendant, to be attached, in order to its sale; two notices of sale were accordingly affixed to the house, when the present Appellant (who was no party to the suit) presented a petition to the Court, on behalf of the Defendant, *Wasdeo Jenardhun*, in which he represented, among other things, that the Respondent's claim upon *Wasdeo* arose prior to *Holkar's* invasion of the city of *Poona*, and was, in fact, upon

* Present: Members of the *Judicial Committee*,—Lord Brougham, MR. Baron Parke, Sir Thomas Erskine Chief Judge of the Court of Bankruptcy, Sir Herbert Jenner, and Sir Stephen Lushington.

Privy Councillor,—*Assessor*, Sir Edward Hyde East, Bart.

Wasdeo's father; that the claim was altogether of a former period, and that the claimant, by continued demurring, had obtained a more recent acknowledgment, upon which, it was alleged, the decree was founded, and that at the time the acknowledgment was given, *Wasdeo* was only twelve years of age; and after stating that no one was present on the part of *Wasdeo Jenardhun*, he prayed that the *Nazir* might have orders to take down the two notices already fixed to the house, and to desist from fixing any more.

Previous to any order being made on the above petition, and on the 31st *March* 1829, the Respondent having presented a counter statement to such petition, procured proclamation for the sale of the property in question to be made, and notice of sale for the 20th *April* then following, was given.

On the 11th *April* 1829, the following order was made upon the Appellant's petition of the 3rd of *March*: "Whatever previous orders you may have received in this matter, likewise any decrees which may have been passed, you are directed to produce them; also any proof you may have of *Wasdeo's* age, which having seen, the Court will issue further orders. In the meantime the attachment shall be suspended five months."

On the 10th of *August*, in the same year, the Respondent presented a petition to the Court, stating that five months had elapsed since the above order, and no proofs of the minority of the defendant (*Wasdeo Jenardhun*) had been shown, and prayed that the sale might proceed; whereupon the Court pronounced an order on the 20th *August* 1829, "That *Pandoorung Bullal Pundit* (the Appellant) be called and examined respecting the proofs, which, if he does not

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produce, the law must take its course in the usual way against the defendant."

The Respondent subsequently presented a further petition to the Court, complaining of the delay, and praying that an order might be made for the sale to take place, and that if the Appellant should make any further hindrance, he should be required to furnish ample security for all damages.

On this petition, the Judge referred it to the *Nazir* of the Court, to make a report of the circumstances. On the 27th *March* 1830, the *Nazir* reported, among other things, that if the defendant, *Wasdeo*, objected to the decree, he should have furnished the requisite securities, and filed an appeal; but that he had not appealed or furnished security for an appeal, pursuant to Regulation IV of 1827, sec. 82;—that the objection on the part of *Wasdeo* had been offered by the present Appellant, who was not an authorised pleader, nor would he give security for the satisfaction of the present Respondent's decree.

Upon this report, the Court, by an order dated the 26th *April* 1830, directed the *Nazir* to proceed to sell the property in question by public auction, according to the usual forms, unless any fresh obstruction should present itself.

On the 3rd *May* 1830, the Appellant filed a plaint in the Court of the Native Commissioner of *Poona*, praying for the removal of the attachment on the property in question, on the ground of its being mortgaged to him by *Narrain Dhondeo* and his brother, *Wasdeo Jenardhun Khandeykur*, for R. 2,163. 2-quarters; he alleged also, that the house in question was originally mortgaged by the father of *Wasdeo Khandeykur* to *Sriniwas Row Narrain* and *Govind Row Es-*

wunt Khateykur, and that it was subsequently redeemed by him (the Appellant), by the payment of the sum due thereon, to the grandson of the mortgagees, and taken possession of by him, together with the deeds and receipts thereof, since which he had remained in quiet enjoyment of it; that the house was the common property of both; and that he (the Appellant) having paid the money on account of *Wasdeo Khandeykur*, the property was made over to him, with a bond for the amount, dated *Saka* 1745, in the month *Sravun-vud*, on the 9th day, from which time he made all the repairs, and had thereon expended R. 836. 2-quarters, making a total disbursement of R. 3,000, which was the amount he claimed upon the house, or R. 1,500 from each of the two brothers, and the defendant (Respondent) having attached the house, he claimed the amount from him, with costs.

The Respondent having been admitted to defend the suit in *formâ pauperis*, put in his answer on the 18th *February* 1831, in which he stated the circumstances which had occurred before the institution of the suit, and prayed that he might be furnished with authenticated copies of all documents adduced as evidence in support of the claim by the Plaintiff. The rejoinder and reply having been filed, the plaintiff produced certain documents in support of his claim. The first purported to be a letter received by him from *Narrain Dhondeo* and *Wasdeo Jenardhun Khandeykur*, dated the 9th day of the month *Sravun-vud*, *Saka* 1745, (A.D. 1823-4) and was as follows:—

"We, *Narrain Dhondeo* and *Wasdeo Jenardhun Khandeykur*, herewith convey to you, *Pandoorung Bullal Pundit*, our warm expressions of friendship and consideration, and beg to acknowledge your letter,

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dated the 3rd day of *Sravun-vud*, which reached by the post, and we have duly observed the contents, which state that,

" *Wamunrow Ramchunder* and *Esswunt Anund Row Khateykur*, the grandsons of *Sriniwas Row* and *Govind-row Dada Khateykur*, having arrived in *Poona*, were anxious to give up the house, as they were in want of their cash which they had advanced upon it, and demanded repayment of the same, or an absolute transfer of the house, to enable them to raise the sum upon it by mortgaging it to some other person. This was the substance of your communication, which has caused us great anxiety and difficulty, and which we cannot well explain in a letter; we regret that it is totally out of our power to raise the money required for the release of the house, and we now write to you, as to our father, and request you to take this house yourself, that our good name may remain untarnished. And we beg you will make some arrangement with the *Khateykurs* respecting the mortgage, and endeavour to get them to take eight anas in the rupee, which you must kindly advance, and take the house as security for the same, together with all the deeds and bonds our predecessors gave relating thereto. We have mentioned eight anas, and if you can make the bargain for four the profit shall be yours, but if for twelve then the excess you must give; but above all we entreat you to relieve us from our difficulty, and preserve the good name of our family. We are far distant, and we give the mansion entirely into your hands, should it require any repairs or alteration, have such as may be necessary made by *Baba Ambeykur* and *Gopal Kessoo Kurumbalkur*; the whole sum for which *Khateykur* has our bond is R. 4,327. If the eight ana arrangement is

made, the half will be R. 2,163, two quarters, on which sum we agree to pay you interest at the rate of three quarters per month, and whatever sums you may expend on repairs and alterations we will repay to you with interest, and till this is paid we will abstain from all right over the mansion. You may keep this letter as a deed written by our own hands; whatever rent may accrue from the house you shall have a half-share, and we will not reckon it as a set-off to our debt to you: the remaining half-share of rent which may come in you must give once to *Gopal Punt Tattia*, until repayment has been made to you of the sum R. 2,163, 2 quarters, disbursed on our account to *Khateykur*, together with any outlays from repairs to the mansion, with interest at three quarters per cent. monthly thereon. We renounce all title or right over the mansion; once more we entreat you to rescue us from the difficulty with *Khateykur*; we rely on you for the preservation of our good name and of that of our family."

The next purported to be a receipt, dated 9th day of *Assin-sood*, in the year *Saka* 1745, (A.D. 1823-4,) passed by *Wamud Row Ramchunder*, and *Esswant Anund Row Khateykur*, to *Narrain Dhondeo*, and *Wasdeo Jenardhun Khandeykur*, reciting, that *Govind Row Esswant*, deceased, their grandfather, and *Sriniwas Row*, also deceased, their father, lent certain monies to *Khandeykur's* deceased fathers, *Dhondeo Gopal*, and *Jenardhun Gopal Khandeykur*, on bond, amounting to R. 4,327, the particulars whereof were there set forth, of which R. 3,401 were secured by mortgage of the house, and the remaining R. 926 on their personal bonds, and that they, the *Khateykurs*, in consideration of the friendship that existed between their respective,

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ancestors, did agree with *Pandoorung Bullal Pundit*, and *Gopal Kessoo Kurumbalkur*, (on the part of the *Khandeykurs*,) of their own free will and consent, to take R. 1,101, and give up all claim to the remaining portion of the debt, amounting to R. 3,226, together with all interest due thereon, and all bonds and documents relating thereto, and they thereby declared, that all other documents relating to that sum were null and void, and that they had no further rights or claim over the *Khandeykurs'* mansion or its appurtenances, or any claim on account of the rents or interest. This document purported to be signed by *Wamun Row Ramchunder*, and *Esswant Anund Row*, and had the names of five witnesses attached as attesting the same.

The Plaintiff also produced a receipt from the *Khateykurs* for the above sum of R. 1,101, dated 5th *Assinvud* in the same year, *Saka* 1745, and attested by two witnesses.

Three of the attesting witnesses to the first receipt, *Bicca-jee Punt*, *Mathoora Baee*, and *Latchman Jadow*, were examined by letters addressed to them, signed by the Commissioner, on which they were directed to indorse their respective answers, and in that way they severally set forth that they knew the transaction respecting the alleged mortgage to have taken place, but by what means they neither of them stated; and that they have placed their signatures to the receipt in question, but neither the signatures attesting the receipts, or subscribed to the answers in question, were proved, or admitted to be the hand-writing of the parties in question. The Plaintiff also examined in the same manner, *Visa-jee Trimbuck Ambeykur*, by whom the repairs to the house were directed to be done, who

replied to the same effect; and stated that the Plaintiff, whenever he made repairs or alterations in the house, consulted him thereon.

The Plaintiff (the Appellant) was likewise examined respecting his connection with *Gopal Kessoo*.

On the 12th *October* 1831, the Native Commissioner decreed, "That the house in question was held in mortgage by *Pandoorung Bullal Pundit*, which said mortgage bars all right of the said Defendant (the Respondent) to attach, in execution of his said decree, the house of the *Khandeykur* family, and the claim and suit, which the Plaintiff, *Pandoorung Bullal Pundit*, has brought against the Defendant, *Balkrishen Hurba-jee Mahajun*, to raise the attachment from the dwelling-house of the said *Khandeykur*, is established and made good," and decreed the Defendant to pay the costs of the suit.

From this decree the Defendant appealed to the Zillah Court of *Poona*, and on the 27th *December* 1831, that Court, after reciting the proceedings, observed "That the suit was founded on the above-mentioned letter alleged to have been sent to *Pandoorung Bullal Pundit*, by *Dhondeo* and *Wasdeo Khandeykur*, who were resident in the northern provinces of *India*, whose hand-writing has not been satisfactorily proved, neither are there any witnesses to the said paper. That the Appellant (the present Respondent) had obtained a decree against *Khandeykur*, and in execution thereof, had attached his (*Khandeykur's*) house, to obstruct which, the Respondent, (the present Appellant,) brought an action against him; but, up to that time, he had not urged or brought forward his claim to the said house, on the ground that he held it in mortgage, and in the outset of the proceedings, gave as his rea-

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son for suing Appellant (Respondent), that the owner of the property resided in a distant part of *Hindostan*, and, therefore, he appeared, as it were, for him. Wherefore, taking all these circumstances into consideration, the Court could not say that the Respondent (Appellant here) had made out his claim on the property, and could not, therefore, confirm the order for removing the attachment." The Respondent (Appellant) was declared liable to costs in both Courts.

On the 22nd *March* 1832, the Appellant presented a petition of appeal to the Sudder Dewanny Adawlut of *Bombay*, from this decree; and upon the motion of the Respondent, by order of the Court, various questions were put, on interrogatories, to the witnesses, whose evidence had been produced on the hearing before the Commissioner.

Bicca-jee Punt, one of the attesting witnesses to the deed of release from the *Khateykurs* to *Khandeykurs*, who had already been examined in the mode above stated, being asked who was present when he was asked to affix his signature to the deed of release, replied, that *Khateykur* and *Pandoorung Bullal Pundit* both came to his house; that *Khateykur* said that he had received the money, and that he (the witness) affixed his signature to the document in his own house, at the request of *Khateykur* and *Pundit*. He stated also, in answer to a further interrogatory, that the document was brought to him by *Khateykur*, drawn out and executed, and given by him to witness; that he could not state what the contents of the deed of release were, as he was only asked to authenticate it with his signature, which he did.

Visa-jee Trimbuck Ambeykur, whose testimony also respecting the transaction had been received by the

Commissioner, was further examined upon interrogatories; and in answer to the question, who wrote or who signed the receipt, replied, that he could not from his own knowledge say; that the *Pundit* told him he had obtained a receipt in the name of *Khandeykur*, and that it was already written; but added, " I saw no witness attest the document in my presence." To an inquiry that it was written in the document, that *Khateykur* had given up the papers and bonds, he answered—but how many bonds there may have been, or what might have been their purport, as well as that they had been given up to the *Pundit* by *Khateykur*, was all hearsay from the *Pundit*; and added, " I saw none of them given over myself."

Interrogatories were also addressed to *Latchman Jadow Row* and *Mathoora Baee*, both of whom appeared as witnesses to the deed of release; but no answers were obtained from either of them.

On the 6th *June* 1833, the Sudder Dewanny Court made its final decree, confirming the decree of the Zillah Court, with costs.

From this decree the Appellant appealed to his late Majesty in Council; praying that the same might be reversed for the following reasons:—

I. Because it was proved that the Appellant advanced from his own monies, the sum necessary to discharge the prior mortgage of the premises, under circumstances which gave him a specific lien upon the property; and no evidence has been given, showing that any part of the same had been, and in fact no part has been, repaid to him.

II. Because it was proved, that the Appellant has made advances for repairs to the premises, under the authority of the mortgagor, and there is no evidence

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that the same has been, and in fact they have not been, reimbursed to him.

III. Because it was proved, that the Appellant has acted under the authority of a valid agreement between himself and the mortgagors, which the parties were competent to enter into, and which it would be inequitable to deprive the Appellant the benefit of.

The Respondent, however, submitted that the decree appealed from ought to be affirmed, for the following reason:—

Because there was no satisfactory evidence that the house of the *Khateykurs* was ever in mortgage; and that even if such mortgage did exist, there was no proof that the premises were redeemed by the Appellant, so as to give him any mortgage or lien on the said house; and the Appellant's whole conduct evinced a design to obstruct and defeat the Respondent's just execution against the property of his debtor, *Khandeykur*.

Mr. *Miller*, Q. C., Mr. *Wigram*, Q. C., and Mr. *Jackson*, for the Appellant.

Mr. Serjeant *Spankie*, Mr. *E. J. Lloyd*, and Mr. *Edmund F. Moore*, for the Respondent.

The Judicial Committee, without calling on the Respondent's counsel, dismissed the Appeal,—

Lord BROUGHAM

Observing, that the Appellant had shaped his case as equitable mortgagee from the *Khateykurs*, alleging that he had paid off, at their request, the mortgage due on their property, and therefore claimed to stand in the position of the original mortgagee, as if a re-

gular transfer of the mortgage had been made to him. That perhaps he had given sufficient proof of his being the hand that had paid off the money under the original mortgage; but that it was his own money, or that he was to stand in the situation of the original mortgagee, he had not made out. That the fact of any equitable assignment having been made to him depended upon the letter, which, though he contended it was genuine, was not proved; that there was in fact no proof in favour of it, and his own conduct in making first a claim on behalf of the infant *Wasdeo*, and not until that failed, any on behalf of himself, was a strong argument against him; and there being no proof of the document upon which he now relied, their Lordships were of opinion that the appeal ought to be dismissed, but without costs.

SOORIAH ROW, Minor, son of the late Rajah Row Vencata Niladry Row, Zemindar of Pettapoor (who was the original Defendant), by his guardian, Chalekany Durma Row - - - - } *Appellant,*

v.

RAJAH ENOOGUNTY SOORIAH (the original Plaintiff) - - - - - - - - } *Respondent.*

On Appeal from the Sudder Dewanny Court of Madras.

30 November 1838.

The Provincial Court having dismissed a suit for mesne profits, on the allegation that the evidence on either side was unsatisfactory, and that the Plaintiff had produced spurious accounts and called perjured witnesses, the Sudder Court, on appeal, though dissatisfied with the evidence, reversed the decree, and estimated the amount of mesne profits from the average of the two preceding years, as ascertained in a former suit. The decree of the Sudder Court affirmed by the Judicial Committee, but without costs.

THIS was an appeal from a decree made in a suit for the recovery of the mesne profits of a certain village called *Gorasa*, in the *Zemindary* of *Pettapoor*. The suit was instituted by the Respondent against the Appellant's father, *Rajah Row Vencata Niladry Row*, for R. 8,860. 0. 6., the amount (with interest) of the rents and profits of the village, received by the *Rajah*, in the years 1823 and 1824.

The right to the possession of this village had been in issue between the same parties in a former suit; in which the Sudder Adawlut at *Madras*, by its decree, dated the 6th *February* 1823, declared that the Respondent was entitled to the possession of the village, and ordered the restoration thereof, together with the

mesne profits from the 28th *March* 1821, the date on which the Appellant's father, *Rajah Vencata Niladry Row*, had obtained possession, under the previous decree of the Provincial Court.

The *Rajah* having appealed from this decree to his late Majesty in Council, the Sudder Adawlut ordered that adequate security should be taken from the Respondent, in whose favour the decree had passed, for abiding by any order which should be made upon such appeal, and that thereupon the village *Gorasa*, with the produce thereof, for the two years 1821, 1822, should be put into his possession, and paid to him, together with his costs in both courts.

In conformity with this order, the Respondent gave the required security; but the Zillah Court made a return, stating that the village *Gorasa* could not be put into the Respondent's possession, in consequence of its being at that time under the Collector's attachment, for a balance due to the Government, in respect of the *Rajah's Zemindary*.

The Respondent having applied to the Court to be put into possession of the village, notwithstanding the attachment, was, in pursuance of an order obtained from the Board of Revenue, on the 11th *December* 1824, put into possession; but not having received the mesne profits for the years *Swabhanoo* and *Tarana* (1823 and 1824), he presented a petition to the Sudder Court, stating that circumstance, when the Court expressed its opinion, that there "was no doubt of his right to the value of the produce of the lands of the village, during the period which intervened from the passing of the decree in the Sudder Court (6th *February* 1823) to the date of its execution (11th *Decem-*

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ber 1824); and that if the amount were not paid, it must form the subject of a new suit, inasmuch as it constituted no part of the original claim tried by the Sudder Adawlut."

The *Rajah* persisting in his refusal to pay these arrears, the Respondent, on the 9th *August* 1826, commenced a suit in the Provincial Court for the Northern Division, to recover them, laying the rent at R. 8,242. 13. 7., the ascertained value of the produce of the village, for the two previous years 1821 and 1822, which, with interest, amounted to R.8,860. 0. 6., the total sum claimed.

The *Rajah*, by his answer, alleged that his *Zemindary* was in the year *Swabahanoo* (1823) totally unproductive, by want of seasonable rain; that the Collector was answerable for the produce of the village for the two years in question, inasmuch as that officer had attached the whole of the *Pettapoor Zemindary*, including the village of *Gorasa*, on the 7th *May* 1823, for an arrear of revenue due by him, and kept it under attachment during the whole of the two years. He denied that the Collector ever took possession of the quantity of produce mentioned by the Plaintiff (Respondent), though he did not state the quantity which the Collector had actually taken possession of.

In conformity with clause third, section 10, Regulation XV. of 1816, the Provincial Court recorded that the only point to be proved in the case was the precise amount of the net profits of the village *Gorasa* in the years *Swabahanoo* and *Tarana* (1823 and 1824).

Pending these proceedings, *Rajah Row Vencata Niladry Row* died, leaving *Sooriah Row* (the present Appellant) a minor, his son, and thereupon the proceed-

ings were continued against *Chalekany Durma*, his guardian.

Both parties produced documents, and examined witnesses to prove and rebut the value of the mesne profits for the years in question.

On the 26th *April* 1826, the Provincial Court pronounced judgment to the following effect:—That neither party had produced any thing like satisfactory evidence of what was the actual produce of the village *Gorasa* in the years *Swabahanoo* and *Tarana* (1823 and 1824), and that as the Plaintiff had produced two spurious accounts and called two perjured witnesses, his claim ought to be rejected, and it was dismissed accordingly with costs.

The Respondent appealed from this decision to the Sudder Adawlut at *Madras*, and that Court, on the 20th *July* 1831, pronounced their decree, in which they stated that they agreed with the Judge of the Provincial Court, in considering the evidence brought forward by both parties, in respect to the extent and value of the produce of the village in question for the two years in dispute, to be altogether unsatisfactory, and not to be depended upon; but they added that "it appeared that the village in question was not in possession of the Defendant in the years *Swabahanoo* and *Tarana*, and that it was under attachment of the Collector previous to the commencement of the former year, and held by that officer until it was delivered up to the Plaintiff in execution of the decree of this Court in *December* 1824. That it was of no consequence to the Appellant (the present Respondent), whether the village was in possession of the Respondent (the father of the present Appellant), or whether it was under attachment by the Collector through the Respondent's

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default; the loss to the Appellant would in either case have been the same; but as the Respondent had no right to the possession of the village, he must be held responsible to the Appellant for the value of such profits as the latter would or might have derived if it had been left in his possession. That what the value of those profits might be, the documents and witnesses in this case did not prove; but it needed only to be observed, that the Defendant himself rated the produce of this very village, in his suit, No 2 of 1820 of the Provincial Court for the Northern Division, at R. 8,132. 2., for two years; and the Northern Provincial Court, in their decree in that suit, awarded in his favour R. 4,011. 11. 2., as the value of the profits of the year *Pramadi*, and according to the plaint, R. 8,242. 13. 7. have been paid to the Plaintiff on account of the profits of the two years, *Vishoo* 1821-2 and *Chittrabhano* 1822-3, up to the date of the decree of the Sudder Adawlut in the appeal suit before alluded to. It might, therefore, very fairly be inferred that the sum claimed by the Appellant as the value of the mesne profits of one year, viz., R. 4,121. 6. 9., is not considerably over-rated, if over-rated at all. Taking, therefore, the valuation put upon one year's produce by the Provincial Court as lower than that estimated by the late Defendant, the Sudder Adawlut considered the Appellant entitled to recover from the Respondent the principal sum of R. 7,023. 6. 4., being the mesne profits of the two years *Swabahanoo* and *Tarana*, after deducting R. 1,000, which the Appellant admitted that he collected after the village was restored to him." The Court further awarded, that the Respondent should pay to the Appellant interest upon R. 4,011. 11. 2., from the commencement of the year *Tarana*,

when that amount became due, up to the date of this decree, at 12 per cent. per annum; and interest upon R. 3,011. 11. 2., from the commencement of the year *Partheeva* up to the same date, at the same rate of interest, together with all costs.

From this decree the Appellant appealed to his late Majesty in Council, praying for a reversal of the above decree, and in support thereof relied on the following reasons:—

I. Because the attachment was owing to the failure of the harvest, and not to the default of the *Zemindar*.

II. Because from the fluctuations of the crops, the profits of the year *Pramathi* (A. D. 1819) was no evidence of the profits of the years in question, to wit, A. D. 1824 and 1825.

III. Because the estate of the late *Rajah Row Vencata Niladry Row* was only answerable for the amount of profits which could be collected without any wilful neglect or default, and it was proved that the amount collected in the years in question was actually much less than the amount decreed to be paid in respect thereof, and there is no evidence of any wilful neglect or default in making the collections.

IV. Because it was proved, that a balance and current demand, amounting together to more than half of the profits of the two years in question, remained to be collected, when the Respondent took possession, and he had therefore no title to recover the amount which so remained from the Appellant.

V. Because the Respondent wilfully evaded the proof of the actual collections, which he might, and ought to have proved, by giving the authentic accounts in evidence.

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The Respondent however insisted that the decree appealed from ought to be affirmed for the following reasons:—

I. Because the Respondent's title to the village *Gorasa* was established by the decree of the 26th *February* 1823, from the date of which he became clearly entitled to the produce and profits thereof.

II. Because the Appellant's father having, after the passing of the aforesaid decree of the 26th *February* 1823, illegally withheld from the Respondent the possession of the village, and having fraudulently caused or permitted the village to be attached, with a view to defeat the Respondent's rights, and to obstruct the course of justice, he was bound to render a just account of the interim rents, and to pay the amount to the Respondent, and the Court was justified in making every fair intendment against a wrong doer, who was bound but omitted to adduce satisfactory proof of the actual amount of the *sists*, and of the actual amount received from the *Ryots* during the period in question.

III. Because the mode adopted by the Sudder Adawlut, of estimating the profits of the village (to which the Respondent was clearly entitled) for the years 1823 and 1824, from an average of the produce admitted by him for the two preceding years, was, under the circumstances, a fair and equitable mode of ascertaining and adjusting the amount of the Respondent's demand, and ought not to be disturbed or altered.

Mr. *Miller*, Q. C., Mr. *Wigram*, Q. C., and Mr. *Jackson*, for the Appellant.

Mr. Serjeant *Spankie*, Mr. *E. J. Lloyd*, and Mr. *Edmund F. Moore*, for the Respondent.

The CHIEF JUDGE of the Court of Bankruptcy:

It is not necessary in this case to enter into a consideration of those circumstances which led to the present action, because the whole issue between the parties was by the conduct of the Court itself, and by the assent of the parties, reduced to this simple question, "The only point to be proved in this case, is the precise amount of the net profits of the village of *Gorasa* in the years *Swabahanoo* and *Tarana* (1823 and 1824)." By this their Lordships understand the Court to state that the only question for the parties to direct their proof to, was, what was the real value of the property during those two years, or in other words, what was the amount which the Plaintiff had lost in consequence of his not being in possession of that property to which he was entitled.

The Court before whom this plaint was first brought was so dissatisfied with the evidence on both sides, that they took the extraordinary course of dismissing the suit altogether, making the Plaintiff pay the costs.

Now, it is obvious from the evidence before the Court, that the Plaintiff was entitled to something, and the Court ought to have ascertained, in the best manner it could, what that was; it ought to have given nominal damages, and ought not to have made the Plaintiff pay the costs when he was entitled to something; but upon the appeal, the Court of Sudder Adawlut seems to have been dissatisfied with the great mass of evidence given on both sides, and they therefore, agreeing with the Provincial Court, that the evidence was altogether unsatisfactory and not to be depended upon as to the actual produce, proceed to say,—"What the value of those profits may be, the documents and witnesses in this case will not prove;

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but it need only be observed, that the Defendant himself rated the produce of this very village in his suit, No. 2 of 1820, in the Provincial Court for the Northern Division, at R. 8,132. 2. for two years, and the Northern Provincial Court in their decree in that suit, awarded in his favour R. 4,111. 11. 2. as the value of the profits of the year *Pramadi*, and according to the plaint, R. 8,342. 13. 7. had been paid to the Plaintiff on account of the profits of the two years *Vishoo* 1821-2, and *Chiddrabhanoo* 1822-3, up to the date of the decree of the Sudder Adawlut in the appeal suit before alluded to; it may therefore very fairly be inferred, that the sum claimed by the Appellant as the value of the mesne profits of one year, viz., R. 4,121. 6. 9., is not considerably over-rated, if it be over-rated at all,—and then they proceed to adjudge to the Plaintiff something less than would be due upon that calculation, after deducting from that amount 1,000 rupees received by the Plaintiff himself. It is impossible for the Court to say, that the fact of the Defendant himself or of those under whom the present Appellant claims; that the Defendant himself in that suit, having claimed the sum of R. 8,000 for two years before, and received half of it for one year's profit, and there having been double that sum paid into Court for two years' profit,—that these facts did not amount to evidence to guide the Court, and to satisfy them that it was a fair average value, because those years, in respect of which that account was taken, were the years immediately preceding 1823 and 1824, the profits of which were under discussion; without saying what the value of the evidence would have been if there had been any contradictory evidence, or if there had been any circum-

stances to show that the value of those years was less than that of the preceding years or any other circumstances, still it is enough to say, it was evidence upon which the Court might, in the absence of any other proof, found its judgment, and that it was a fair calculation of the profits of the years 1823 and 1824. The Court has discarded altogether the evidence of the Defendant, as well as the other evidence of the Plaintiff, and if their Lordships, upon looking at the evidence for the Defendant, could see that it placed within reach any means of saying how much less than that sum, the produce of the years 1823 and 1824 was worth, they would have availed themselves of the opportunity thus given of correcting any error into which the Court of Sudder Adawlut might have fallen in taking the amount of preceding years; but when the evidence of the Defendant is looked at, it really seems to be perfectly valueless, because it depends upon the testimony of two witnesses, *Volaty Ramcurapa* and *Volaty Hanoonranloo*, who state, according to their judgment, what the assessment of those two years actually was; but they are not the persons making the assessment, they had no accounts to produce to corroborate it, and they are speaking at a distance of ten years. The first witness states that he is a *Mirasadar* or *Curnam*,* of *Gorasa*, from which it would seem he had been the person making out the account, but, upon an examination of the evidence, we find he was not the person making out the account, but his younger brother, and all the ground upon which he builds his testimony, that the assessment in 1823 was R. 950, and in 1824, R. 860, seems to rest, upon what he states afterwards as a fact, that he used to see these accounts, when

* Accountant or register of a village.

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the parties had an opportunity of producing the accounts themselves, and the parties who made the account; the Court cannot receive that as evidence of the fact of the assessment having been to that amount—he did not make it—he borrowed his knowledge from seeing the accounts only, and it therefore is not receivable as evidence of the actual amount of the assessment. The evidence of the next witness is more loose; though he states some knowledge corresponding with the other witness, he had no personal knowledge of it, and very slight means of knowledge; indeed, he says, "As myself and the *Gorasa Curnam*, named *Valati Came Raz*, are cousins, and as I used to go to *Gorasa* occasionally, having a *Mariam* there, I understood the above circumstances;" which, being translated, means he and I used to talk them over, and that was our understanding: but where is the cousin, why was not he called—if it was to depend upon the evidence and the account of the *Curnam*, why was not he called, having made the assessment, to prove the value? The accounts were not to be the measure of the value, but the knowledge of the person making the assessment would be evidence, and it might be very strong evidence of what the value was.

Those being the only two witnesses who interfered with the conclusion drawn by the Court, that as the value of the village was 4,000 and odd rupees in 1819, 1820, 1821 and 1822, that, therefore, they might presume it was about the same in 1823 and 1824: it seems to their Lordships that they cannot question the decision the Court has come to in adjudging to the Respondent that amount, *minus* the sum he is proved or admitted to have received, R. 1,000, and therefore that the judgment of the Court below must be affirmed, but without the costs of this appeal.

STEPHEN LAZAR and his wife THAMAR LAZAR - - - - - - - - - - } *Appellants,*

v.

COLLA RAGAVA CHITTY - - - - - *Respondent.**

On Appeal from the Sudder Dewanny Court of Madras.

3 December 1838.

THIS was an Appeal from the decree of the Sudder Court of *Madras*, confirming a sale made by the Sheriff of *Madras*, under a writ of *fieri facias*, issued out of the Supreme Court, of certain real estates, comprising amongst other property two villages situate in the *Mofussil*, and *without* the jurisdiction of the Supreme Court: upon the whole of which, an equitable charge had been created, by the Will of one of the Appellant's ancestors in her favour.

Shamier Sultan, an Armenian Merchant of *Madras*, was at the time of his death possessed amongst other property of the villages of the *Noombul* and *Pooliumbut*

Legacy of 12,000 star pagodas reserved by a testator from his estate, and devised in favour of his great grand-daughter, having in pursuance of the directions contained in the Will, been put in strict settlement by the Executors, and subsequently secured by a mortgage of the real estate of the Testator to the trustee of the settlement: held to be an equitable charge upon the whole of the real estate of the Testator, and there being no evidence of the payment off of such charge, the sale of a portion by the Sheriff of *Madras*, under a writ of execution declared to be invalid.

Quere.—Whether the Sheriff of *Madras* can under a *fieri facias* issued out of the Supreme Court, directing him to seize and put up for sale "*goods and chattels within the jurisdiction of the Supreme Court,*" seize and sell lands and chattels in the Mofussil.

* Present: Members of the *Judicial Committee*,—Lord Brougham, Lord Denman, The Chief Judge of the Court of Bankruptcy, and Sir Herbert Jenner.

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in the *Talook* of *Manimungalum*, *Zillah Chingleput*, in the Presidency of *Madras*, together with a *Bungalow* and other premises in the same villages, and also of a mansion and premises, situate in the Armenian Street at *Black Town*, and various other houses and premises in *Madras*. Shortly before his death, which happened some time about the year 1797, he made his Will, whereby he directed certain sums of money, amounting to 12,000 star *Pagodas*, to be reserved out of his estate, and bequeathed the same to his great grand-daughter, *Thamar Lazar*, one of the Appellants, directing that in the event of her marriage with a person of the Armenian nation, the same should be put in strict settlement, and he appointed his son *John Shamier*, his grandson *Nazar Jacob Shamier*, the father of the Appellant *Thamar Lazar*, and some other persons executors of his Will.

Nazar Jacob Shamier, alone proved the Will, *John Shamier* having declined to act; and the other executors having died, he became the sole acting executor, and as such entered into possession and receipt of the rents and profits of the villages, together with the *Bungalow*, and other premises and houses in *Madras*, and continued in such possession down to the time of the mortgage thereof, made to the trustee of the Appellants.

On the 17th of *February* 1814, the Appellant *Thamar Lazar*, then *Thamar Nazar Shamier*, intermarried with the Appellant *Stephen Lazar*, a person of the Armenian nation.

By an Indenture of settlement, dated the 15th of *February* 1814, made and executed by the Appellant *Stephen Lazar* of the first part, the Appellant *Thamar Lazar*, then *Thamar Nazar Shamier*, spinster, of the

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second part, *Nazar Jacob Shamier*, described as the acting executor of the last Will and testament of *Shamier Sultan*, of the third part, and *Jacob Nazar Shamier*, eldest son of *Nazar Jacob Shamier*, of the fourth part, after stating the intended marriage between *Stephen Lazar*, and *Thamar Nazar*, and reciting the facts above stated, and reciting also, that an account had been stated between *Thamar Nazar Shamier*, (with the privity of *Stephen Lazar*, her intended husband,) and *Nazar Jacob Shamier*, as the acting executor, in respect of the sums bequeathed by the testator, and that it had been found and admitted, that the principal sum of 12,000 star pagodas, given to *Thamar Nazar Shamier* by the Will of *Shamier Sultan*, and also the sum of 8,000 star pagodas for balance of interest accrued upon the same, (amounting in the whole to the sum of 20,000 star pagodas,) were then due from *Nazar Jacob Shamier* as such acting executor, and were subject and applicable to the trusts and purposes therein declared. And reciting that *Thamar Nazar Shamier* as the only daughter and one of the three children of *Meerjaun Nazar Shamier* deceased, (who was the wife of the said *Nazar Jacob Shamier*, and who was one of the two daughters of *Joseph Lazar* and *Catherine Joseph Lazar*, formerly of *Bombay*, and then respectively deceased,) was entitled to a certain distributive portion or share of the estate possessed by *Catherine Joseph Lazar* previously to her death, consisting wholly or for the most part of property which had been realized by her, as administratrix of the estate of her husband *Joseph Lazar* deceased, which estate of *Joseph Lazar* and *Catherine Joseph Lazar*, in so far as *Thamar Nazar Shamier*, *Jacob Nazar Shamier* and *Joseph Nazar Shamier* were

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interested, was then subject to the control and order of the Court of the Recorder of *Bombay*. And reciting, that it had been agreed, upon the treaty for the marriage, that all the interest and expectant property of *Thamar Nazar Shamier*, in right of her mother, or otherwise, in the estate of *Joseph Lazar*, or of *Catherine Joseph Lazar*, should be received by *Jacob Nazar Shamier* as a trustee, for the purposes and for the trusts, in respect of the last mentioned property therein declared. It was witnessed, that in consideration of the intended marriage, and in the execution and performance of his trust and duty, as the acting executor of the Will of *Shamier Sultan*, *Nazar Jacob Shamier*, for himself and his heirs, executors and administrators, covenanted with *Jacob Nazar Shamier*, and his executors, administrators, and assigns, that as soon as the intended marriage should have taken effect, and until the birth of a child, he, together with *John Shamier*, or other the executors of the Will of *Shamier Sultan*, and the survivor of them, should stand possessed of, and interested in, the principal sum of 20,000 star pagodas, in trust to abide the provisions and dispositions made by the Will of *Shamier Sultan*, in the event of *Thamar Nazar Shamier* dying without issue of the marriage. And that so soon as a child should be born of the marriage, then that he, and also *John Shamier* or the survivor of them, or the executors or administrators of such survivor or other, the representatives for the time being of *Shamier Sultan*, should pay or cause to be paid unto *Jacob Nazar Shamier*, or his executors or administrators, or other the trustees or trustee for the time being of that indenture, the said 20,000 star pagodas, and all such accumulations of interest and

profit as should have been made thereupon respectively from the date thereof. And it was covenanted and agreed by all the parties, for themselves and their respective heirs, executors and administrators, and declared to be the true intent of the parties, that as well all the property, interest, and expectancy of *Thamar Nazar Shamier*, in or to, or forthcoming, or to be derived from the estate of her maternal grandfather *Joseph Lazar*, or the estate of her maternal grandmother *Catherine Joseph Lazar*, as also the whole and every part of the sum of 20,000 star pagodas, when the same or any part thereof should, after the birth of a child of the marriage, be paid from the estate of *Shamier Sultan* to the trustees; should be subject to and received, holden, paid, and applied upon and for the trusts, intents, and purposes therein declared, and the provisions therein made concerning the same: viz. upon trust that *Jacob Nazar Shamier*, or his executors or administrators forthwith, or as soon as conveniently and practicably might be, after the said intended marriage, should, by the ways and means therein mentioned, get in and receive the distributive share or shares of the said *Thamar Nazar Shamier*, of and in the estates of *Joseph Lazar* and *Catherine Joseph Lazar* respectively. And upon trust when and so soon as the sum of 20,000 star pagodas, and also the monies and property last thereinbefore referred unto, as receivable from the estates of *Joseph Lazar* and *Catherine Joseph Lazar*, should be received, to lay out and invest, and from time to time to keep invested in the name of *Jacob Nazar Shamier*, or in the name or names of the trustee or trustees for the time being, the whole of the same monies and funds, in the purchase, or on the mortgage of real property within the limits of

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Madras, or on the pledge of jewels or other valuable personal property, or in the public securities of some or one of the British Governments in *India*, as by the trustees for the time being should be considered most eligible and expedient, and to vary, exchange, or renew all, or any of such property, or securities from time to time as there should be occasion; and to receive such rents, issues, and profits, and also such dividends, interest, and proceeds as they should respectively become due and be receivable, and pay unto *Thamar Nazar Shamier*, or permit her to receive during her natural life, the whole, or a competent and sufficient part of the same rents, issues, dividends, interest, profits, and proceeds, to the intent that the same might be applied in so far as should be needful for the maintenance of her, and of such children, if any, as should be of the intended marriage, independently of the control, debts, or engagements of *Stephen Lazar* her intended husband: and after her decease; upon trust to stand possessed of the same, for the benefit of such persons, in such portions, manner, and form, and payable at such times as she by any deed, instrument, or writing, or by her last Will and testament in writing, or any writing purporting to be, or in the nature of her last Will to be subscribed by her in the presence of, and to be attested by, two or more credible witnesses, should give, dispose of, limit, appoint, or bequeath the same; and for want of such gift, disposition, limitation, appointment, or bequest: upon trust to stand possessed thereof, for all such children, or only child, as should be of the intended marriage, equally if more than one, and if but one, then for that one; to be payable to sons at twenty-one, and to daughters at twenty-one, or day of marriage, which should first happen,

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with trusts for maintenance and education; and in case of failure of all such issue or their death, under twenty-one, to be distributed according to the statutes of distributions among the then next of kin of *Thamar Nazar Shamier*. And it was thereby declared to be the understanding and agreement of the parties, that after the solemnization of the marriage between *Stephen Lazar* and *Thamar Nazar Shamier*, and until a child of such marriage should be born, *Nazar Jacob Shamier*, and the representatives for the time being of *Shamier Sultan*, should pay and apply the interest and proceeds which might by them be derived of, from, or in respect of the aforesaid sum of 20,000 star pagodas, towards and for the occasions of *Stephen Lazar* and *Thamar Nazar Shamier*, in so far as might be consistent with the Will of *Shamier Sultan*, and that if *Thamar Nazar Shamier* should depart this life without issue of the marriage, then *Nazar Jacob Shamier* and the representatives for the time being of *Shamier Sultan* should apply the monies, funds, and securities according to the directions and provisions contained in the Will of *Shamier Sultan*. And it was further covenanted and agreed by and between all the parties, and declared to be their intent and meaning, that *Jacob Nazar Shamier* and his executors and administrators, and the trustees for the time being of the trust premises, at their or his discretion, as to all or any part or parts of the rents, issues, dividends, interest, proceeds, or profits which should, from time to time arise or be made from the several sums of 12,000, and 8,000 pagodas, or any parts or part thereof, or from the monies or funds to be derived from the estates aforesaid; or which might be invested and

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which should not have been by the trustees applied for or towards the trust purposes thereinbefore mentioned, should lay out and invest the same in the purchase of any houses, buildings, or lands within the limits of *Madras*, or by way of mortgage upon any such property, or by way of pledge upon jewels or other valuable articles, and that all such houses, lands, buildings, securities, and property, when purchased or accepted by way of mortgage or pledge, should be subject in all respects to the same trusts as those thereinbefore declared, to which the principal funds or securities from which such rents, issues, dividends, interest, profits, and proceeds might have arisen, were by that Indenture subjected to. And in the Indenture was contained a provision for the appointment of a new trustee in the room of *Jacob Nazar Shamier*, if he should die or desire to be discharged, or should refuse to act before the trusts of the Indenture had been fully performed.

The marriage was accordingly solemnized, and there was issue three children, who were living at the period of the institution of the suit out of which the present appeal arose.

In the month of *April* 1819, no part of the principal sum of 20,000 star pagodas having been paid by *Nazar Jacob Shamier* to *Jacob Nazar Shamier*, the trustee of the settlement, and there being an arrear of interest due from *Nazar Jacob Shamier* in respect thereof, he agreed to secure the payment of such principal sum and interest to the trustee upon the trusts of the settlement, by a mortgage of the aforesaid villages of *Noombul* and *Pooliumbut*, together with the *Bungalow* and other appurtenances, and the mansion-house in

Black Town, and other houses and premises in *Madras*, part of the testator *Shamier Sultan's* estate; and accordingly a Mortgage-deed, bearing date the 20th of *April* 1819, was executed by *Nazar Jacob Shamier*, which was as follows: "To all to whom these presents shall come, whereas, by an Indenture of Settlement bearing date the 15th day of *February* 1814, made and entered into previous to the marriage of *Thamar Nazar Shamier*, spinster, with *Stephen Lazar*, it was by the said Indenture recited that *Shamier Sultan*, formerly of *Madras*, deceased, did in his lifetime, in and by his last Will and testament, written in the Armenian language, bearing date the 12th day of *May* 1797, give and bequeath unto the said *Thamar Nazar Shamier*, two sums of 6,000 pagodas, amounting in the whole to the sum of 12,000 pagodas, which together with interest accrued due thereon, up to the day of the execution of the said deed, amounted to 20,000 star pagodas, and further reciting as therein is recited, and by the said Indenture of Settlement it was covenanted and agreed, on the part of the said *Nazar Jacob Shamier*, as executor of the Will of the said *Shamier Sultan*, that when and as soon as the said recited marriage between the said *Stephen Lazar* and *Thamar Nazar Shamier* should take effect, and until the birth of a child of the said marriage, that he, the said *Nazar Jacob Shamier*, should stand possessed of and interested in the said several principal sums of 6,000 and 6,000 pagodas, amounting together with interest aforesaid, to the sum of 20,000 pagodas, upon the trusts, and to and for the uses in and by the said Indenture of Settlement declared; and that so soon as a child should be born of the said intended marriage, then that the said *Nazar Jacob Shamier*, or

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his survivor, or the executors or administrators of such survivor, or other the representatives for the time being of the said *Shamier Sultan*, deceased, should well and truly pay or cause to be paid unto *Jacob Nazar Shamier*, the trustee appointed in and by the said Deed of Settlement, the said several sums therein and hereinbefore particularly mentioned, amounting in the whole to the sum of 20,000 star pagodas, and all such accumulation of interest and profit as should have been made thereon, previous to the date of the said Deed, in trust, to be applied by him the said *Jacob Nazar Shamier* as such trustee to the uses expressed and declared in and by the said Deed of Settlement; And whereas the time limited by the said Deed of Settlement for the payment of the said sum of 20,000 star pagodas has long since elapsed, and the said *Nazar Jacob Shamier*, as sole acting executor of the Will of the said *Shamier Sultan*, has on his part failed in the performance of the stipulation and conditions expressed in and by the said Deed of Settlement, and hath not as yet paid the said sum of 20,000 pagodas into the hands of the said *Jacob Nazar Shamier*, the trustee appointed in and by the said Deed of Settlement; Now these presents witness, that the said *Nazar Jacob Shamier*, for and in consideration of the said sum of 20,000 pagodas, now justly due and owing by him as the executor of the said *Shamier Sultan*, and which doth of right belong to the said *Thamar Nazar Shamier*, subject to the trusts expressed in the said Deed of Settlement, hath mortgaged, assigned, transferred, and set over to the said *Jacob Nazar Shamier*, and by these presents doth mortgage, assign, transfer, and set over to the said *Jacob Nazar Shamier*, as such trustee as aforesaid, the following landed property, (that is to say) the villages of *Noombul* and

Pooliumbut, the family-house of the late *Shamier Sultan*, situated in the Armenian-street in the Black Town of *Madras*, and No. 8, the ground situated on the south side of the said family-house, facing on the east the Armenian-street, and on the south Errabauly-street, the house situated on the south side of the said family-house facing towards the said Errabauly-street No. 27, the house No. 105 situated in the Armenian-street, and occupied by Mr. *Jacob Arathoon*, and the house No. 26 in Errabauly-street now occupied by *D. Sherriman*, Esq., to have and to hold the said villages, ground, and houses respectively, with the rents, issues, and profits thereof, unto him the said *Jacob Nazar Shamier* as such trustee as aforesaid, or unto such other person, or persons as shall or may from time to time hereafter be appointed, trustee or trustees of the said hereinbefore recited Deed of Settlement, until by receipt of the rents, issues, and profits thereon, the said sum of 20,000 star pagodas, and all interest now due or hereafter to grow due thereon, shall be fully paid and satisfied, and no longer. In witness, &c."

Upon the execution of the above Mortgage-deed, *Nazar Jacob Shamier* delivered over to the Respondent, *Stephen Lazar*, (*Jacob Nazar Shamier*, the trustee, being at the time a lunatic,) the *perwanna* by which the revenues of the villages were assigned by the *Nawaub Wallajah*, and certain acknowledgments by the English Government, of the right of the *Shamier Sultan* to such villages under such grant, and the Respondent held such documents and the Mortgage-deed until the appointment of *Stephen Narcis* to be a trustee of the settlement; but *Nazar Jacob Shamier*, as such acting executor of *Shamier Sultan*, continued in possession of the villages and other mortgage premises.

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In the month of *February* 1821, the whole of the principal sum being unpaid, and all the interest thereon from the date of the mortgage, the Appellants, *Stephen Lazar* and *Thamar Stephen Lazar* his wife, and their children, *Lazar Stephen Lazar*, *Heripsimah Stephen Lazar*, and *Nazar Stephen Lazar*, by the Appellant, *Stephen Lazar*, their father and next friend, filed a bill in the Supreme Court at *Madras*, on the equity side, against *Nazar Jacob Shamier*, *Jacob Nazar Shamier*, *John Shamier* (as one of the surviving executors who had intermeddled with the estate of *Shamier Sultan*), and *Joseph Nazar Shamier*, and against *Chinna Tambi Moodely* (as claiming some lien in equity upon the houses and premises at *Madras*, part of the estate of *Shamier Sultan*, comprised in the aforesaid Mortgage-deed of 1819, by force of the possession of some title deeds, deposited in his hands by *Nazar Jacob Shamier*) for an account and payment of what was due for principal and interest on the above legacy, and that the same might be secured in Court upon the trusts of the settlement, and if necessary, for a foreclosure and sale of the villages and other mortgaged premises, and that the deficiency of such sale, if any, might be made good by the executors, or out of the general assets of the testator, *Shamier Sultan;* and to remove *Jacob Nazar Shamier*, from being a trustee of the said settlement, upon the ground of his incapacity to act.

In *January* 1823, one *Chinna Tambi Moodely* obtained judgment at law by confession in the Supreme Court at *Madras* on the Plea Side, against *Nazar Jacob Shamier* and *Joseph Nazar Shamier* for two several sums of 49,000 and 3,880 pagodas and costs, the amount of the penalties of two bonds of *Nazar Jacob Shamier* and *Joseph Nazar Shamier*; and about the same time *John*

De Fries and Co. of Madras also obtained judgment in the Supreme Court, on the Plea Side, against *Jacob Nazar Shamier* and *Joseph Nazar Shamier* for 26,000 pagodas, the penalty of another bond and costs, which they subsequently assigned to *Chinna Tambi Moodely*.

Being thus in possession of these judgments against the *Shamiers*, *Chinna Tambi Moodely* sued out of the Supreme Court at *Madras* two writs of *fieri facias* for their several amount. Both writs were in the ordinary form, commanding the Sheriff to levy of the houses, lands, debts, and other effects, real and personal, of *Jacob Nazar Shamier* and *Joseph Nazar Shamier*, *within the jurisdiction of the Supreme Court*; the amount of the penalties of the bonds.

Pending the execution of these writs, and on the 3rd of *June* 1823, the Appellants obtained an order *nisi* in the cause already instituted by them against the *Shamiers* and *Chinna Tambi Moodely*, to restrain the Sheriff from selling or disposing of the villages, houses, and premises comprised in the above-mentioned Indenture of Marriage Settlement, and Assignment of Mortgage until the final hearing of the cause.

The Cause did not come on to be heard until *April* 1826, previous to which *Jacob Nazar Shamier* died, having by his Will appointed *Nazar Jacob Shamier* his executor, against whom the suit was duly revived, but he having made default in appearing, the Plaintiffs were allowed to take such decree against him as they could abide by; the bill being taken *pro confesso* against *Joseph Nazar Shamier*; but as against the Defendant *John Shamier*, who it appeared had not acted in the trusts of *Shamier Sultan's* Will after the date of the settlement

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of the 15th of *February* 1814, and as against *Chinna Tambi Moodely*, the Bill and also the order *nisi* of the 3rd of *June* was dismissed with costs.

By Indenture bearing date the 20th *July* 1826, made in pursuance of the powers contained in the Appellant's marriage settlement, *Stephen Narcis* was appointed a trustee in the room of *Jacob Nazar Shamier* deceased.

By an Indenture of release and assignment, of the 21st day of *July* 1826, made and executed by *Nazar Jacob Shamier* of the one part, and *Stephen Narcis* as such trustee of the other part, reciting the Mortgage-deed of the 20th of *April* 1819, and that there was then due and owing to *Stephen Narcis*, as substituted trustee of the settlement, upon the mortgage security, the principal sum of 20,000 pagodas, and all interest from the date of the mortgage; and further stating the bill and the decree *nisi* obtained in the Supreme Court against *Nazar Jacob Shamier*, and that the Appellants had consented to abandon and discontinue the suit against him, upon condition that he would for ever foreclose and debar himself of all equity of redemption, in the villages of *Noombul* and *Pooliumbut*, and the houses and other property comprised in the mortgage deed, to and in favour of *Stephen Narcis*, upon the trusts of the marriage settlement, *Nazar Jacob Shamier*, for the consideration therein mentioned, which he had agreed to do, released and assigned all his estate and equity of redemption in the aforesaid villages, with the appurtenances, together with the houses and other property comprised in the mortgage deed of *April* 1819, to *Stephen Narcis* as trustee upon the trusts of such marriage

settlement for the Appellants; and at the same time and by a separate instrument the Appellants executed a general release to *Nazar Jacob Shamier* from all demands.

In consequence of the above suit having been dismissed as against *Chinna Tambi Moodely*, he on the 22nd of *July* 1826, proceeded to sue out another writ of *fieri facias* against the goods and chattels of *Nazar Jacob Shamier* and *Joseph Nazar Shamier* within the jurisdiction of the Supreme Court of *Madras*.

On the 24th of the same month the Sheriff made a return both to the writ issued at the suit of *De Fries* and Co., and also to that last mentioned, in which he enumerated amongst the property seized both the houses in Black Town and the two villages of *Noombul* and *Pooliumbut*, the property of the *Shamier Sultan*. On the 28th of *July* 1826, *Nazar Jacob Shamier*, for himself, and as executor of *Jacob Nazar Shamier* and *Joseph Nazar Shamier*, gave notice to the Sheriff that the aforesaid villages were not their property, nor were they in any manner interested therein, nor were they the estate of *Jacob Nazar Shamier* deceased; and on the next day the Appellants and *Stephen Narcis* gave notice to the Sheriff that the villages were not the property of the Defendants named in the writs of *fieri facias*, nor had any or either of them any title to and interest therein, and required him to withdraw his notices of sale thereof, and to remove his seals and *peons*; and notice to the same effect was advertised in the Commercial Circulator newspaper.

Chinna Tambi Moodely, and *Palava Seva Chocalingum Moodely*, and *Rama Samy Naik* having, however, given two bonds of indemnity to the Sheriff, against

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all damages he might incur by reason of seizing or selling the villages; the Sheriff on the 8th of *August* 1826 put up the villages of *Noombul* and *Pooliumbût* to auction, and *Colla Ragava Chitty* (the Respondent), acting as the agent of *Chinna Tambi Moodely*, was declared the purchaser thereof at the price of 11,850 pagodas.

The Appellants and their trustee being at the time of such sale in possession of the villages and premises, and in receipt of the revenues, insisted that the sale was altogether invalid, and refused to give up possession of any part of the property.

The Respondent, after some preliminary proceedings in the Zillah Court of *Chingleput*, filed his plaint in the Central Provincial Court against the Appellants for the recovery of the villages, and the revenues from the time of the sale in the month of *August* 1826.

To this plaint the Appellants appeared and put in their answer, and therein, after stating their title under the Will of *Shamier Sultan*, and the several deeds of mortgage and release above mentioned, they insisted that the Sheriff of *Madras* had no right to interfere with the villages in question, *which were not within the jurisdiction of the Supreme Court of Madras*, and were not and never had been the property of the persons against whom the several writs of execution had been issued, and that the Respondent claiming under a bill of sale made by the Sheriff, had no right or title as against the Appellants to the villages.

The cause having come on to be heard before the Court, a decree was made on the 31st of *July* 1830, whereby the Court declared, for the reasons therein set forth, that the sale of the villages of *Noom-*

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bul and *Pooliumbut*, with their appurtenances, by the Sheriff to the Respondent, was unjustifiable, and dismissed the Respondent's suit with costs.

From this decision the Respondent appealed to the Court of Sudder Adawlut, and that Court, on the 8th of *April* 1833, reversed the decree of the Centre Provincial Court of the 31st of *July* 1830, and adjudged, that possession of the villages of *Noombul* and *Pooliumbut* should be given to the Respondent, and that the Appellants should make good to the Respondent the mesne profits accrued from the villages from the 18th of *August* 1826, and pay all the costs incurred both in that Court and in the Centre Provincial Court.

On the 15th of *July* 1833, the Appellants petitioned the Court of Sudder Adawlut to review their decree, which the Court refused.

The Appellants, feeling themselves agrieved by such proceedings, appealed to His Majesty in Council, and submitted that the decree of the Court of Sudder Adawlut ought to be reversed, and the decision of the Centre Provincial Court affirmed, for the following reasons:—

I. Because the Respondent claimed the villages and premises under a bill of sale made by the Sheriff of *Madras*, under the writs of execution of the 22nd of *July* 1826, issued out of the Supreme Court of *Madras*, whereby the Sheriff was commanded that of the goods and chattels of *Nazar Jacob Shamier* and *Joseph Nazar Shamier within the jurisdiction of that* Court, and of the goods and chattels of *Jacob Nazar Shamier* and *Joseph Nazar Shamier within the same jurisdiction.* he should cause to be made the sums of money in such

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writ mentioned. And it was admitted that such villages and premises were not within the jurisdiction of the said Court, and the Plaintiff did not prove that the same were the property of the said several persons or any of them; or that they or any of them, ever had possession thereof, except the said *Nazar Jacob Shamier*, as executor of *Shamier Sultan*, and as part of the estate of *Shamier Sultan*, and did not prove that the Sheriff had any right to interfere with the possession of such villages, or could make any legal title thereto.

II. Because the villages were not the property of *Nazar Jacob Shamier*, *Jacob Nazar Shamier*, and *Joseph Nazar Shamier*, or any of them, but the same, or the revenues thereof, were the estate of *Shamier Sultan*, subject to the payment of his legacies. and were legally vested in the trustee of the settlement of the 15th of *February* 1814, for the Appellants and their issue, as a security for, or in satisfaction of the legacy given by *Shamier Sultan* to the Appellant *Thamar Lazar*, and upon the trusts of that settlement.

III. Because, if the villages and premises had been the property of the several Defendants named in the writs of execution, which they were not, yet the same *were not within the jurisdiction* of the Supreme Court of *Madras*, and the Sheriff could not take the same in execution under the aforesaid writs, nor make any legal, valid, or effectual sale thereof.

IV. Because, even if the villages had been the property of *Nazar Jacob Shamier*, *Jacob Nazar Shamier*, and *Joseph Nazar Shamier*, and had been within the jurisdiction of the Court, yet under the writs of execution against the goods and chattels of the several persons, the Sheriff was not authorized to seize lands

and houses, and could not make a legal title to the above-mentioned villages and premises.

On the part of the Respondent however, it was contended that the decree appealed from ought to be affirmed for the following reasons:—

I. Because, even if the villages in question had originally formed part of the general assets of *Shamier Sultan*, who died about 1797, there was sufficient evidence that they were the private property of *Nazar Jacob Shamier*, or of him and *Joseph Nazar Shamier*, and were liable to be taken in execution for their debts, no creditor or legatee of *Shamier Sultan* having taken any legal steps for payment, and there being evidence that the claims of the Appellants for their legacy had long been liquidated.

II. Because the Mortgage Deed of the 20th day of *April* 1819, was executed with a view to defeat the creditors of *Nazar Jacob Shamier*, and without consideration, and was fraudulent and void, a point which must have been substantially decided in the Supreme Court of *Madras*, when the present Appellants in vain attempted to prevent the sale of that property to which the Respondent acquired title under the execution.

Sir *William Follett*, K.C., and Mr. *Teed*, for the Appellants.

The whole question in this case turns on the right of the respective parties to the villages of *Noombul* and *Pooliumbut*. It is clear that they both were the property of *Shamier Sultan*, and were never the property of the Defendants, the *Shamiers* in the suits in the Supreme Court. The Will is recited in the Marriage

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Settlement, and that instrument having been proved in the suits, is notice to the Sheriff of *Madras* of the equity at least of the Appellant's title. The Sheriff had no right or power therefore to sell the villages under the execution issued in those suits. The vendee of the Sheriff can have no title to the possession until he has shown that they were the property of the Defendants in one or the other of the actions. There is no pretence for saying that it was joint property, or even that it was the property of either of the parties in those suits. The proceedings are irregular throughout, the writ under which the sale took place did not command the Sheriff to sell lands at all, but only "the goods and chattels of the parties *within the jurisdiction* of the Supreme Court." Then the lands sold were not within the jurisdiction of the Supreme Court: it was proved at the trial, and uncontradicted, that they were *without* the jurisdiction of the Supreme Court. The charter under which the Supreme Court was constituted, provides that the Supreme Court shall fix certain limits beyond which the Sheriff shall not be compelled or compellable to go in person, or by his officers or deputies for the execution of any process of the said Court.*

The charter appoints another mode in which the process may be executed, that is, by a special warrant directed by the Chief Justice of the Supreme Court to a particular officer under certain conditions; but in this case nothing of the kind was done. It is clear, therefore, that the judgment of the *Sudder Adawlut* is wrong, that the vendee of the Sheriff has no title to these lands, and consequently no power to disturb the possession of the Appellants.

* Charter of Madras, Appendix to Strange's Mad. Rep., vol. iii. p. 47.

Mr. Serjeant *Spankie*, and Mr. *E. J. Lloyd*, for the Respondent.

There is no evidence to prove that the Appellants were devisees under the Will of the *Shamier Sultan*: the probate of the Will was never produced in evidence, and without it they even have no title to the land in question, except under the mortgage, which was a fraudulent transaction; and it lies on the other side to prove the existence of a valuable consideration as the foundation of the deed. The Supreme Court has a personal jurisdiction everywhere over a certain class of persons in the service either of Her Majesty, or the East India Company. *Nazar Jacob Shamier* and *Joseph Nazar Shamier* were inhabitants of *Madras*, subject to the jurisdiction, and liable therefore to be sued in the present action. The *Sudder Adawlut* recognizes the Sheriff of *Calcutta* seizing property out of the local jurisdiction where a party has made himself subject to the jurisdiction of the Supreme Court of *Calcutta*. *Anunchund Rai* v. *Kishen Mohun Bunoja*, * *Petamber Ghose* v. *Ghureeb Ollah*, † *Gopee Mohun Thakoor* v. *Ramtunnoo Bose*, ‡ *Raminder Deo Rai* v. *Roopnarain Ghose*, § *Kishenmohun Bunhoojee* v. *Ramindur Deb Rai*, ‖ *Zumeroodeen* v. *Rammohun Mullik*. ¶

Sir *William Follett* in reply:

If the practice has been, as contended by the Respondents, for the Sheriff of *Madras* to sell lands out of

* 1 Mac. Sud. Rep. 115.
† ib. 167.
‡ 2 Mac. Sud. Rep. 19.
§ ib. 118.
‖ 2 Mac. Sud. Rep. 197.
¶ 3 Mac. Sud. Rep. 111.

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the jurisdiction of the Supreme Court under writs of execution, directing them to seize goods and chattels only, within the jurisdiction, this Court cannot uphold such a practice: the authority of the Supreme Court is prescribed both by the Act of Parliament * and by the Charter. With regard to the second point, it was for the Respondent to make out his title that he has a right to possession.

Lord DENMAN:

Their Lordships in this case have had to consider the propriety of the judgment of the *Sudder Dewanny Adawlut* in setting up a bill of sale to the Respondent, executed by the Sheriff who had taken possession under certain writs of *fieri facias*. Two very important questions have arisen with regard to the jurisdiction both of the Sheriff and the Court; there certainly is a great peculiarity in the language of the writ, which requires him to seize goods and chattels within the jurisdiction, but under which he has seized lands which are not *prima facie* within the jurisdiction of the Supreme Court, and it is doubtful to their Lordships whether the Sheriff had any right to proceed against those lands which it seems are not within the jurisdiction limited to the Supreme Court by the Charter of the King, but within the *Jaghire* of the Company; but their Lordships do not think it necessary to enter into the consideration of either of these questions, and the point not necessarily coming before them, they do not think they ought to volunteer an opinion upon questions of such magnitude. Upon the other part of the case, their Lordships are

* 39 & 40 *Geo.* III.

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of opinion that the Appellants are entitled to their judgment.

Without entering into the question of whether the mortgage transaction was fraudulent or not, or in what sense and to what extent it may have been fraudulent, the opinion of this Court proceeds upon its being generally admitted on all hands, that the Appellants had an interest in the property in question under the Will of *Shamier Sultan*, and possessing that interest, there is nothing like a sufficient proof, if proof could have been produced, that they were in any way divested of it: it does not appear indeed how they could be divested of it, for though the female Appellant *Thamar Lazar* might before marriage have released her right, yet her children had a vested interest after her death, and after the settlement no payment could have been made which would have extinguished the interest of all the parties.

It appears that the possession was changed in the year 1826, because that is the period to which the bill of sale relates. But that was only a transfer of the same estate from one trustee to another, and could in no degree alter or vary the rights of the Appellants. With respect to the charge of fraud, their Lordships do not feel it necessary to give any opinion, as they are not satisfied that the interest which was originally created by the Will of *Shamier Sultan* has been extinguished by payment to the Appellants, and in that view of the case they are of opinion that the Appellants had an interest which the creditors of the *Shamiers* had no right to possess themselves of—their Lordships feel bound to say that the seizure and the sale have for that reason been improper.

We think, therefore, that the judgment of the Court

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of *Sudder Dewanny* must be reversed, and the original judgment of the Provincial Court be revived; and we not only relieve the Appellants from paying costs, but give them their costs in the second instance, and their costs of appeal here.

ESHWUNT ROW THORAT DINKUR ROW - *Appellant*,

v.

NILLOBA and JOTEEBA THORAT - - *Respondents.**

On Appeal from the Sudder Dewanny Adawlut, Bombay.

17 December 1838.

The Sudder Dewanny Adawlut of *Bombay* have no jurisdiction to entertain an appeal from a decision of the Collector or Commissioner appointed to adjust the claims of *Jaghiredars*, which is final, if delivered before the promulgation of Reg. xxix of 1827.

Eshwunt Row Thorat Dinkur Row (the Appellant) was *Jaghiredar* of the village of *Virgow Dahu-jee*, &c., in the pergunna *Akolé* (*mokassa*), held on tenure of military service. In 1818, the *Peishwa* having been expelled from the *Deccan*, the British Government was established in that district, and the whole of the property of the *Enamdars*, as well as of the *Jaghiredars* and *Wuttundars*, was sequestered; and so continued until the year 1819, when the Honourable Mr. *Elphinstone* having, by order of the Government, examined into the state of the *Wuttundars* rights, gave orders to the *Malkuree* and *Mamlutdar* (or chief authority in the district), to release the estates of the *Jaghiredars* and *Wuttundars*.

In consequence of these orders, a petition was presented by the whole *Thorat* tribe, praying for a continuance of their *Jaghires* and *Mokassa*, which they

* Present: Members of the *Judicial Committee*,—Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, the Chief Judge of the Court of Bankruptcy, and Sir Stephen Lushington.

Privy Councillors,—*Assessors*, Sir Edward Hyde East, Bart., Sir Alexander Johnston, Knt.

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had held and enjoyed for a long time, the result of which was, that the *Jaghires*, *Wuttuns*, and *Mokassas* were given to all their holders, and the Appellant was put in possession of the village of *Virgow Dahu-jee*, from the revenues of which the Respondents were declared entitled to receive 4,100 rupees annually, on account of their *Jaghires*. For two years the Respondents received their share, when the Appellant claiming to be entitled to the whole of the revenue of the village, refused to make any further payment to them. In consequence of this refusal, the Respondents presented a petition to the Collector, Mr. *Pottinger*, who ordered the Appellant to adjust the dispute; which, having failed to do, the Respondents presented a memorial to the Commissioner, Mr. *Chaplin*, who gave directions to the Collector to issue an order enjoining the payment to the Respondents of their shares, and requiring the Appellant to settle the business.

This order having been served on the Appellant, it was agreed by all parties to settle the dispute amicably, and accordingly on the 1st of *December* 1820, an agreement was made out, under the seal and signature of all the parties, setting forth that the three persons, the Appellant and Respondents, were entitled to equal shares.

This agreement was acted upon for two years, when the Appellant again refused to pay the Respondents their respective shares, alleging, that he had never, in fact, acknowledged the Respondents claim, or consented to the above agreement. The matter having been referred for the investigation and decision of Mr. *Boyd*, the then Collector, a memorandum was prepared by him, dated the 26th *August* 1823, framed in accordance with the previous agreement, which contained a statement of the estimated amount of the revenue of the

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village, and appropriated the various payments to be made out of it, and the amount of the Respondents respective shares.

The Appellant refused to acquiesce in this arrangement, and the subject was in consequence again brought before the Commissioner, who, in a letter dated the 3rd of *May* 1826, addressed to the Collector, expressed his opinion, that the original agreement having been made voluntarily, ought to be confirmed.

This opinion was intimated by the Collector to the *Kamavisdar** of *Akolé*, who was directed to exact a fulfilment of the memorandum of settlement of the 26th *August* 1823.

The *Kamavisdar* not having acted in compliance with the directions of the last-stated letter, the Collector addressed to him a second letter, requiring him to state his reasons for not having done so, without delay.

Notwithstanding these various proceedings, the Appellant still continued to dispute the decision of the Commissioner; upon which a memorandum, dated the 14th of *October* 1827, was addressed by the Collector to the Appellant, containing the following passage: "Hereafter let not the shares of either of the *Thorats* be allowed to be disputed, but let them be received, and in every thing let them be protected." The continued refusal to comply, on the part of the Appellant, produced a final letter from the Collector, dated the 22nd of *January* 1828, which concluded thus: "This letter is written directing the business to be conducted in conformity to Mr. *Boyd's* decree, as ordered in the letter above mentioned; if any

* Native Revenue Collector.

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further resistance is made, the parties will be subject to punishments,—know this." From this order of the Collector, the Appellant, on the 18th of *April* 1828, appealed to the Sudder Dewanny Adawlut, alleging that the above orders were given unjustly, and *ex-parte* against him, and prayed that the Court would make inquiry relative to the execution of the memorandum of the 26th of *August* 1823, and to which the Appellant alleged he had in no way agreed, and would direct the orders issued to the *Kamavisdar* and others, and also those issued by the Collector, to be annulled.

The Court of Sudder Dewanny Adawlut admitted the petition of appeal, though not conducted in the form of a regular appeal against a judicial determination, and issued orders to the agent for *Sirdars* at *Poona* to transmit the original papers and proceedings.

A return was made by the Collector, explaining the various applications of the parties, and the determinations which had taken place.

The Respondents put in their Answer to the Appellant's petition of appeal, denying its statements, and contending that the decisions previously passed were conformable to the true interests of the parties in a joint property, and were founded on the Appellant's own agreement.

On the 23rd *July* 1829, the Sudder Court pronounced its ultimate decree, wherein it decided that it was not competent to it to make any inquiry into the merits of the case, but that the adjustment of the Collector, Mr. *Boyd*, under date 26th *August* 1823, finally confirmed by the Commissioner, Mr. *Chaplin*, under date 3rd *May* 1826, must be held binding, and the Court decreed all

the costs of the appeal to be borne by the Appellant.*

From this decree the Appellant, in the Sudder Dewanny Adawlut, appealed to his late Majesty in Council, and relied on the following reasons :—

I. Because the opinion expressed by the Commissioner, in his letter of the 3rd of *May* 1826, was not and could not be considered a final decision of the matters in dispute, inasmuch as it was the result of an inquiry to which the Appellant was not a party.

II. Because no order prior to that of *January* 22nd, 1828, could be considered a final order, and therefore, under the provisions of Regulation XXIX of A.D. 1827, the Court of Sudder Adawlut had jurisdiction, and ought to have entertained the appeal in this case.

III. Because the Judges of the Sudder Adawlut did not assign or record any abstract of the reasons which led them to hold that the suit was not appealable to that Court, and had also definitively affirmed the judgment of an inferior Court, in a matter over which they themselves declare they had no jurisdiction.

The Respondents, however, contended that the decree appealed from ought to be affirmed for the following reasons :—

I. Because the Appellant never adopted the regular course of proceedings in a court of justice, to establish the rights he claimed.

II. Because the Appellant was bound by the articles of agreement, dated the 26th *August* 1823, in which

* By *Bombay* Regulations XXIX of 1827 & V of 1828, an appeal now lies to the Sudder Adawlut, and from thence to the King in Council.

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he had acquiesced, and on which he for some time acted.

III. Because the order of the Commissioner, Mr. *Chaplin*, of the 3rd day of *May* 1826, was final.

Mr. *Miller*, Q. C., Mr. *Wigram*, Q. C., and Mr. *Jackson*, for the Appellant.

Mr. Serjeant *Spankie*, Mr. *E. J. Lloyd*, and Mr. *Edmund F. Moore*, for the Respondents.

The Judicial Committee, after hearing the Appellant's counsel, dismissed the appeal, and affirmed the decree of the Sudder Adawlut with costs, observing that it was quite clear that the Sudder Adawlut had no power to entertain the appeal from the decision of Mr. *Chaplin* in 1826, which was final; and therefore that the provisions of Regulation XXIX of A.D. 1827 could not apply.

SOORIAH ROW - - - - - - - - *Appellant*,

v.

COTAGHERY BOOCHIAH - - - - - *Respondent*.

On Appeal from the Sudder Dewanny Adawlut of Madras.

17 December 1838.

A. purchased a *Mootah* of B. and held possession till his death, when B. under colour of a Bill of sale alleged to have been executed by A. two days before his death, obtained possession. On a claim brought by the Widow and heiress-at-law of A. for recovery of the *Mootah* and mesne profits, no sufficient proof of the execution of the Bill of sale having been given; possession was adjudged to her with the mesne profits from the period of her husband's death.

Semble.—The Plaintiff is limited to the sum laid in his plaint as mesne profits, though by the evidence a larger sum appears due to him.

RAJAH COTAGHERY NILADRY ROW, the late husband of the Respondent, purchased, on the 27th *April* 1819, from *Rajah Row Vencata Niladry Row*, the *Mootah* of *Kirlumpoody*, for R. 33,500, which he paid at the time. The *Mootah* was duly registered in his name, pursuant to Regulation XXV, section viii of 1802, and he continued to pay the *kists*, and to enjoy the produce, and to transact the general business relating thereto, until the 9th day of *March* 1822, (two days previous to his death,) when his father, *Srinavasa Row*, undertook the management.

On the 8th of *March*; *Cotaghery Niladry Row*, being seriously indisposed, made his Will, whereby he bequeathed the whole of his estate (including the *Mootah* of *Kirlumpoody*) to the Respondent, who was his legal heiress according to *Hindu* law and local custom, and on the 11th of the same month he died, leaving the Respondent, his widow and heiress-at-law, him surviving.

The Respondent duly apprised the Collector of the

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circumstance of the *Rajah's* death, and at the same time informed him that *Cotaghery Niladry* had executed a Will on the 8th (three days previous to his death), bequeathing the whole of his estate, including the *Mootah* of *Kirlumpoody* to her, a copy of which she forwarded; and on the 28th, in obedience to the direction of the Collector, transmitted him the original.

Rajah Vencata Niladry Row, however, set up an adverse claim to the *Mootah* of *Kirlumpoody*, under a Bill of sale, which he produced, dated the 6th of *March* then preceding, which purported to be a re-sale of the *Mootah* for the sum of R. 33,500, the price at which the deceased had originally purchased it; this instrument was in the following form: "I who am twenty-two years old, being since six months afflicted with bodily pain in consequence of the sickness called *rata jadiam*, I am certain from the state of my body, and from the opinion of the doctors, that I will not live; I have in consequence this day sold to you for R. 33,500, the *Kirlumpoody Mootah* which I purchased from you for the same amount, on the 27th *April* 1819. And having thus transferred the *Mootah* to you in perpetuity, you are henceforth to pay the company's revenue of R. 23,306. 8. annually, according to the *kists*, and yourself and your posterity are to enjoy the profits which may be derived from the said *Mootah*;" he alleged also that the deceased had addressed to the Collector an *arzee* or letter of the same date, informing him of the sale of the *Mootah*, and requesting him to register the same to *Vencata Niladry Row*.

Having obtained the assistance of *Srinavasa Row*, the father-in-law of the Respondent, *Vencata Niladry Row* took possession of the *Mootah* and the villages belonging thereto, and presented an *arzee* to the Col-

lector, stating the circumstances of the sale, and requesting that the *Mootah* might be registered to him.

At the time of the decease of *Cotaghery Niladry Row*, a suit was pending in the Provincial Court, instituted by him in the year 1819, for the recovery of the village of *Jugapaty Nagaram*, appertaining to the *Mootah* of *Kirlumpoody*, and on the 3rd of *April* 1822, *Vencata Niladry Row*, in an *arzee* addressed to that Court, requested to be allowed to promote the suit, on the ground of his having bought the *Mootah* on the 6th of *March* preceding. The Respondent, however, presented a counter-petition, stating that *Vencata Niladry Row* had no claim whatever to be admitted as a party to such suit; that the Bill of sale was fabricated by him after the decease of her husband, and was not genuine; and that her husband executed a Will to her, she being his heiress according to *Hindoo* law; and she requested the Court to pass an order for the prosecution of the cause being conducted by herself.

The Court, having taken both petitions into consideration, on the 17th of *April* 1822, rejected the application of *Vencata Niladry Row*, on the ground of the admission on his part that the alleged transfer had not been registered, and allowed the Respondent to prosecute the suit.

On the 9th of *August* 1822, the Respondent addressed an *arzee* to the Board of Revenue, stating in it the circumstance of *Vencata Niladry Row* having endeavoured to obtain possession of her rightful *Mootah*, and requested that it might be put into her possession; but, on the 29th of the same month, the Collector, in a letter addressed to *Vencata Niladry Row*, wrote as

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follows: "I having communicated to the Board of Revenue the whole of the circumstances connected with the subject, they have issued orders for the said *Mootah* of *Kirlumpoody* being transferred in your name, and I have accordingly registered the said *Mootah* in your name: consequently, I herewith send enclosed the advertisement, published for the purpose of all those concerned submitting to your orders." In consequence of this order, the Board of Revenue indorsed on the Respondent's *arzee* of the 9th, that the request contained in the Collector's Report, to permit the Bill of sale to be registered, had been complied with, but that it would be no bar to the Respondent's recovering her right by legal proceedings.

Vencata Niladry Row continuing to retain possession of the *Mootah*, the Respondent filed her plaint in the Provincial Court on the 27th *December* 1824, whereby, after stating to the effect above set forth, she insisted that the Bill of sale alleged to have been executed by her late husband on the 6th *March* 1822, was a fabrication by *Vencata Niladry Row*; that her husband being of great wealth, had no need to sell the *Mootah* in question, and if he had already sold it, would not have caused it to be inserted in his Will, executed two days afterwards; that had the pretended sale of the *Mootah* five days before the death of her husband been a real transaction, *Vencata Niladry Row* (the Defendant), who was a man of intelligence, would have apprized the head Assistant in charge of the circumstance, and have got the transfer registered, the head Assistant residing at the distance of only a few hours walk; that the register of the transfer (after the death of her husband) was illegal, and contrary to the custom of the country, and repugnant

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to the principles of section viii, Regulation XXV of 1802; and she prayed that the Court would pass a decree in her favour, that the Defendant (*Vencata Niladry Row*) might pay her R. 25,387, the amount of revenue after deducting the permanent assessment for the years 1822 and 1823, and restore the *Mootah* of *Kirlumpoody*, together with the costs incurred.

On the 23rd *May* 1825, *Vencata Niladry Row* put in his answer, asserting that *Srinavasa Row*, was as the unseparated father of the late *Cotaghery Niladry Row*, his heir, and denied that *Cotaghery Niladry Row* had purchased the *Mootah* from him, though he insisted upon the validity of the Bill of sale, and impeached the Will as a forgery, asserting that he, *Vencata Niladry Row*, the Defendant, had held the management of the *Mootah* up to the very day on which the Plaintiff's late husband sold it to him.

The replication and rejoinder having been filed, and the Court, in conformity with clause 3rd, section x, Regulation XV of 1816, recorded that the points to be established by the respective parties, were:—By the Plaintiff,—the net annual profit derived by the Defendant from the *Mootah* in the *Fusly* year 1232—1233: By the Defendant,—that the Plaintiff's late husband sold the *Kirlumpoody Mootah* to him for R. 33,500, on the 6th of *March* 1822,—that the Defendant brought the transaction to the notice of the head Assistant Collector in charge on the 7th of *March* 1822, and the net profit derived by him from the *Mootah* in the *Fusly* years 1232-1233.

Both the Plaintiff and Defendant produced in evidence the documents already alluded to, and examined witnesses in their proof: they also produced witnesses on either side, to prove the amount of the mesne profits,

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but the books which were in the Appellant's custody were not produced.

In the meantime, on the 5th *March* 1828, and before the decree in the cause was pronounced, *Rajah Vencata Niladry Row* died, leaving *Sooriah Row* (the present Appellant), an infant, his son and heir, by whom, through his guardian, *Chalekany Dhurma Row*, the defence was thenceforth conducted.

On the 12th of *March* 1828, the Provincial Court pronounced its decree in favour of the Respondent, expressing its opinion on the merits of the case in the following terms:—"That this cause had its origin in forgery, and was to be supported by perjury, was to be feared from a view of the pleadings. If *Cotaghery Niladry Row* was not deranged for some days previously to his death, the Will which Plaintiff asserts he made in her favour, and the Bill of sale which Defendant asserts he executed in his favour, cannot both be true: he may have executed neither. The legal consideration, however, of the authenticity of the Will, need not detain the Court; it is only in a moral point of view that they need doubt whether Plaintiff also may not have had her agents of forgery to antedate a Will two days before the Bill of sale, and solely for the purpose of countermining it. The execution of the Will was unnecessary, as Plaintiff would be *Cotaghery Niladry Row's* heir without that formality, and therefore evidence on that point was not called for. It is otherwise, however, with regard to the Bill of sale; on its authenticity or otherwise depends the issue of this suit. The Court have no hesitation in pronouncing it a forgery. So evidently artificial is the statement of Defendant's witnesses in echo of his laboured defence, as to neutralize any strength that the

unhesitating manner in which they uttered it might give to their evidence; and to render it of such little value, that the Court would as soon think of decreeing away a *Zemindary* upon the evidence of as many *Firashes* (menial servants). So scrupulous are they in giving their testimony, that they will not even allow the order in which the several persons entered the Assistant Collector's *cutcherry** six years ago to escape their recollection. The fluent and unhesitating manner in which they gave their depositions, may, however, be accounted for; they may have rehearsed and repeated the story over so often, that they actually believe it to be true, and certainly there was ample time for concocting the defence and arranging the *dramatis personæ*. On the 7th *February* 1825, Defendant's Vakeels applied for and obtained leave to give an answer in two months; on the 4th of *April* they applied for and obtained leave of six weeks more, making three months and a half, under pretence of requiring copies of certain documents from the *cutcherry* of the Collector of *Rajahmundry*. On reference to their long answer, it is evident that this was mere pretence for the purpose of gaining time, for there is not a document even alluded to but of which Defendant must already have had a copy, such as the Bill of sale, and *arzees* to the Collector, or at all events have known its contents, and their production to the Court, along with the answer, was of course not required, and not till upwards of three months after the rejoinder was given." In conclusion, the Court proceeded to say, "That they might not be suspected of any wish to avoid trouble, the Court have examined the witnesses named by the parties; but it

* Office.

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was evidently not necessary, for the Defendant in his answer has clearly proved his statements to be false. In the first place, he has stated that he purchased the *Mootah* of *Kirlumpoody* on the 21st *September* 1818 on his own account, though from regard for *Cotaghery Niladry Row* he registered it in his name; but in his petition to the Sudder Adawlut he alleged that he re-sold it to *Cotaghery Niladry Row* on the 27th *April* 1819, and in his third statement now before the Court, he declares that he again purchased the *Mootah* on the 6th of *March* 1822 from *Cotaghery Niladry Row*, four days before the latter died, and for which purpose the Deed of sale, numbered 28 in this record, was given to the Defendant. If these transactions actually occurred as detailed in the answer, the Defendant must have paid twice over for the *Mootah* of *Kirlumpoody*, but neither of the statements are true; and it is rather extraordinary, if the *Mootah* were only registered in the name of *Cotaghery Niladry Row*, that he should have collected the produce of it for three years, and when at the point of death he should be paid the amount of R. 33,500 by *Niladry Row* for what, if he spoke the truth, actually belonged to himself at the time. From the above view of the case, the Court are of opinion that the Plaintiff's claim to the *Mootah* of *Kirlumpoody* is clearly established, and that the Defendant's attempt to dispossess her of property which she legally inherits from her deceased husband, has been backed only by perjury and forgery. The decree therefore is, that the Plaintiff (Respondent) be put in possession of the *Mootah* of *Kirlumpoody*, and the value of the produce sued for, being R. 25,387, and that the Defendant's heirs do pay all costs."

Rajah Row Sooriah Row, being dissatisfied with this

decision, appealed from it, by his guardian, to the Sudder Adawlut, and on the 19th of *October* 1831, the appeal was heard, and a decree made, affirming the decree of the Court below.

In this decree of affirmance, the Sudder Adawlut stated as follows :—

" It is quite evident that the whole merits of this case must necessarily rest upon the validity of the document filed by the father of the Appellant, namely, the Bill of sale said to have been executed to him by the deceased *Cotaghery Niladry Row* on the 6th of *March* 1822. This document, supposing it to be valid, proves too much for the Appellant's case, inasmuch as it proves most decisively that *Cotaghery Niladry Row* did purchase the *Mootah* from the Appellant's father, and that the denial of such transaction by the Appellant's father is utterly false and unfounded. This fact is proved by the document itself, and which document was filed by *Rajah Niladry Row*. The Court, therefore, arrive at this conclusion, that *Cotaghery Niladry Row* possessed the *Mootah* of *Kirlumpoody* by right of purchase. But the Court are of opinion that its repurchase by the late *Rajah Niladry Row* is by no means proved. The evidence in support of it is, in the opinion of the Court, totally unworthy of credit, independent of the motives assigned for the sale, which are various : firstly, that *Cotaghery Row* sold it to satisfy his creditors ; and secondly, that it was to pay off the debt of the original purchase-money. The Court entirely concur in opinion with the Provincial Court that the case of the Appellant has been backed both by perjury and forgery."

The Court therefore affirmed the decree of the Pro-

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vincial Court, and adjudged that all costs should be paid by the Appellant.

The Appellant appealed from this decree to his late Majesty in Council; praying that the same might be reversed for the following reasons:—

I. Because the validity of the purchase by Bill of sale and registration, was fully established by the Appellant's evidence in the cause.

II. Because the alleged Will was a forgery.

III. Because the Courts below ought to have required proof from the Plaintiff (now Respondent), of her title as heir to *Cotaghery Niladry Row*, and ought not to have assumed that title in her against the Defendant in possession.

IV. Because it is proved that *Cotaghery Niladry Row*, until his death, lived with his father *Srinavasa Row* as an undivided family, and consequently, according to the *Hindu* law applicable to this part of *Hindustan*, *Srinavasa Row*, and not the Respondent, was the heir to *Cotaghery Niladry Row*.

V. Because the Courts below have declared the Respondent entitled to the sum claimed by her plaint as the amount of the profits accruing from the *Mootah* during the years *Chitrabhanoo* and *Swabhanoo* (A.D. 1822-3 1823-4), without any evidence sufficient to establish the fact that such was the amount, and against evidence proving that a much smaller sum was the actual amount of the profits during that time.

The Respondent on the other hand, submitted that the decree appealed from ought to be affirmed, and relied upon the following reasons:—

I. Because, putting the Will in Respondent's favour out of the case, and upon which indeed it is not neces-

sary to rely, *Cotaghery Niladry Row* having died without issue male, the Respondent, who was his widow, and living with him at the time of his decease, was, by the *Hindu* law, his heiress, and the *Mootah* in question if not aliened to the late *Vencata Niladry Row*, by the Bill of sale on which he relied, devolved upon her, and she was entitled to immediate possession.

II. Because the Bill of sale relied upon, and produced by the late *Vencata Niladry Row*, was a forged and fabricated instrument, and did not confer any title.

Mr. *Miller*, Q. C., Mr. *Wigram*, Q. C., and Mr. *Jackson*, for the Appellant.

Mr. Serjeant *Spankie*, Mr. *E. J. Lloyd*, and Mr. *Edmund F. Moore*, for the Respondent, referred to Colebrooke's Digest, vol. iii. chap. 8.

Lord BROUGHAM :—

It appears to their Lordships that there is no sufficient ground for setting aside the judgment appealed against; we concur in the opinions expressed both by the Provincial and Sudder Court, respecting the fraudulent character of the Bill of sale set up by the Appellant, as well as the absence of all satisfactory proof of the heirship of *Srinavasa Row* and without on the other hand inquiring into the validity of the Will of the late *Cotaghery Niladry Row*, their Lordships are sufficiently satisfied from both decrees below, that the Respondent must be considered by the laws and customs of the country the legal heiress to the *Rajah*, her husband. The principal and indeed only question their Lordships have had to consider is, respecting the amount awarded

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for the mesne profits during the years the Appellant retained possession of the *Mootah*. On that point it was for the Appellant to satisfy us that injustice has been done him by the decree of the Court, and though it has been correctly observed, that the case of the Plaintiff was scanty in point of evidence; a sufficient answer has been made by the learned Serjeant and Mr. *Moore*, that from the situation of the Plaintiff, she being out of possession, the evidence of that which was in contest between the parties, namely, the amount of mesne profits, was not so fully within her reach as it was within the reach of the Appellant, but that there was on her part evidence enough *prima facie*, as we should say here, to go to a jury. It was for the Appellant to consider how he should meet that evidence. He might have rested upon the defect of the Plaintiff's evidence, but it being incumbent upon him here to show the judgment of the Court below to be wrong, we must see what was the nature of the evidence before that Court. The Defendant who now appeals, might have left the Plaintiff to prevail by the force of his own case, contending that he was not called upon to answer it unless it was such as if unanswered disposed of the case: but, instead of relying upon the weakness of the Plaintiff's case, he met it and undertook to rebut it by counter-evidence; we must look then to the sort of evidence produced, and certainly that is not such as might have been expected. In the first place, it cannot escape observation, that on the part of the Appellant, the Collector, who from his situation must have been well acquainted with the whole subject-matter, better acquainted than any other witness, and with the means of information within his reach, is not called. Then with respect to the books, from

which alone the true amount of the mesne profits could be ascertained, whatever we may say as to the change of possession of these books in the subsequent stage of the cause, at that period when proof as to their amount was adduced on the other side, these books were within reach, in the actual possession of the Appellant: and the Court below, we have no doubt, proceeded upon this principle, that every thing is to be presumed against a party keeping his adversary out of possession of the property, and out of possession of the evidence, and taking means to retain that evidence in his own custody: and that the proof on the part of the Plaintiff was to be pressed most strongly against the Defendant, where by virtue of such possession he received the rents and profits of the estate, and kept the books in which the accounts were recorded: and this notwithstanding the Plaintiff gave the most scanty proof of the rents and profits; a position which we do not quite accede, though we agree in the main decision of that Court. There is another point to which the Court below must have attended; namely, that the credibility of the witness is shaken by the gross discrepancy between the two accounts, between R. 400 on the one side, and upwards of R. 12,000 on the other. The observation one cannot help making upon this part of the evidence is, that it proves too much on behalf of the Defendant, who gives such suspicious evidence; in answer to which it was ingeniously suggested at the bar, that it cannot be supposed that the witness was suborned, for that if he was possessed of common shrewdness he would not have overdone the thing, and thus have given rise to such an objection. That is a very tender argument before a Court, and too doubtful to justify this Court in placing any considerable reliance

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upon it; for we do find, happily for the ends of justice, that men fall into these inconsistencies, and by means thereof the fraudulent character of the evidence becomes apparent.

On the other point, viz. the title of *Srinavasa Row* as the unseparated father of *Cotaghery Niladry Row*, it is necessary to say only one word. The property in question was treated as separate property by the very act on the part of the Appellant, on which he most relies, the original sale to *Cotaghery*. Upon the whole of this case therefore, we are of opinion that there is no ground to alter the decree appealed from. With respect to the damages, the Court have given the amount laid in the original plaint, but it appears that adding the interest a greater amount was proved, and the Court was restrained from giving that greater amount, only because they could not give more than the amount claimed. Considering the circumstances of this case, we cannot avoid giving the Respondent costs.

SREE MUTTY BISSNOSOONDERY DABEE, and another - - - - - - - - } *Appellants*,

v.

RAJAH BURRODACAUNT ROY - - - *Respondent.**

On Appeal from the Supreme Court of Bengal.

IN EQUITY.

12 February 1839.

Leave given to restore an appeal dismissed for want of prosecution, the Appellants' agent though instructed to prevent the dismissal of the appeal, not having received the transcript until after the expiration of a year and a day from the time of the allowance of the appeal, and the Respondent having in consequence thereof obtained an order of dismissal.

THIS was a motion for leave to restore an appeal which had been dismissed for want of prosecution.

The original suit was instituted by the Respondent against the mortgagees of certain *Pergunnas* for redemption of the mortgage, and to set aside the sale of one, made in pursuance of the powers contained in the mortgage deed, as fraudulent and void: and for the usual accounts.

After various preliminary proceedings, and the filing of a supplemental and cross bill, the cause came on for hearing, before Sir *John Peter Grant*, one of the puisne Judges of the Supreme Court, who on the 11th of *April* 1835, made a decree, by which the sale in question was declared null and void; and a reference directed to the master to take an account of the rents and profits of the *Pergunna* accrued since the date of the sale.

* Present: Members of the *Judicial Committee*,—Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, Mr. Justice Erskine, and Sir Stephen Lushington.

Privy Councillor,—*Assessor*, Sir Edward Hyde East.

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This decree was subsequently affirmed on a rehearing (Sir *John Malkin* dissentient,) by the whole Court, on the 10th of *May* 1836.

From this decision the Appellants appealed to his Majesty in Council, and having filed their petition for leave to appeal within the six months allowed for that purpose, obtained the final order for such permission on the 9th of *February* 1837. The Respondent having obtained and forwarded a copy of the proceedings in the suit to his agents in England, and no steps having been taken by the Appellants to prosecute the appeal within the ordinary time, (viz. a year and a day,) the Respondent on the 12th of *May* 1838, presented a petition in the usual form, to dismiss the appeal for want of prosecution, accompanied by an affidavit, stating that the Appellants had taken no steps to prosecute the appeal, and praying also for costs. The petition came on for hearing on the 16th, when the Court ordered the appeal to be dismissed with costs, including the costs of the transcript, which were directed to be taxed by a Master of the Common Pleas. This order was confirmed by her Majesty in Council on the 8th of *June* following.

On the 21st *November* 1838, the Appellants presented a petition to rescind the order for dismissal, and for liberty to prosecute the appeal. The petition was supported by the affidavit of their agents in England, which after detailing the nature of the proceedings, and the circumstances above stated, proceeded to depose that it appeared from the papers in the cause, that the transcript was not certified by the Chief Justice until the 11th of *December* 1837; that on the 8th of *January* 1838, they received a letter from the Appellant's solicitor in *India*, dated 19th

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of *August* 1837, directing them to retain counsel on the appeal, and informing them that the delay which had taken place in procuring the appeal papers, which were very voluminous, containing upwards of 5,000 folios, had been occasioned by the Respondent's agent having first bespoke the copy of the transcript, but that they would be forwarded at the earliest opportunity, and instructing them if the Respondent should urge the hearing of the appeal before the papers should reach England, to delay the hearing until their arrival; that on the receipt of the above letter, they made inquiry at the Council office, and ascertained that the Respondent had not at that time taken any steps to dismiss the appeal, and that it was not until the month of *July* that they discovered that the order of the 16th of *May* 1838 had been made, but that the same had not, up to that day, been delivered out of the Council office, by reason, as they were informed, of some doubts having arisen respecting the question of costs; that the copy of the transcript did not arrive in England until the month of *August*, in consequence whereof the agents were unable to take any steps to stay the proceedings to dismiss the appeal: they stated also the value of the property in issue to be of great amount, exceeding 38 lacs of rupees, or £380,000.

In opposition to the motion, an affidavit was made by the Respondent's solicitor, who had lately arrived in England, contradicting the statement respecting the cause of delay in the Respondent's first obtaining his copy of the transcript, and affirming that the Appellant's agent in Bengal had ample notice of the Respondent's intention to proceed to dismiss the appeal for want of prosecution, to enable him to have forwarded the

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transcript in due time. He stated also that the Appellants being *Hindoo* women of rank, had availed themselves of the privileges of their caste, and had thrown every impediment in the way of the suit, by evading personal service of the orders of the Court, which had only at last been effected after the whole process of contempt had been exhausted.

Mr. *Campbell* and Mr. *C. Austin* for the Appellants,

Now moved to restore the appeal, contending that the Respondent having bespoke the first copy of the transcript, the Appellants were necessarily precluded from forwarding their copy within the limited time; they relied on the discretionary power of the Court to let in the appeal at any time, notwithstanding the period usually limited had elapsed.

Mr. G. *Richards*, and Mr. *Turton* for the Respondent,

Insisted on the grounds detailed in their affidavit, and the regularity of their proceedings, and objected to the Appellants being let in to appeal under any terms.

LORD BROUGHAM:

We are all of opinion that under the circumstances of the case the *laches* of the Appellants cannot justify our shutting them out from their appeal; and that the order therefore of the 16th of *May* 1837 must be rescinded; but upon the terms of their paying the costs incurred by the Respondents in

India as well as here, consequent on the order of dismissal, which are not costs in the cause, and giving security to the amount of £500 for the contingent costs here, such security to be perfected within two months.

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v.

RAJUNDER NARAIN RAE and COOWER MOHAINDER NARAIN RAE (sons and representatives of SREE NARAIN RAE deceased) - - - - - - - - - } *Respondents.*

On Appeal from the Sudder Dewanny Court of Bengal.

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By the *Hindu* law in force in *Mitheela* or *Tirhoot* the right of succession vests in the descendants in the paternal in preference to those of the maternal line; and such law continues to regulate the succession to property in a family who have migrated from that district, but have retained the religious observances and ceremonies of *Mitheela.*

A suit having been instituted to recover the estate of a *Hindu Mithalese* by the maternal first cousin of the last male proprietor, who claimed to be entitled according to the law in force in *Bengal*—Held by the Judicial Committee (affirming the judgment below) that according to all the authorities, the *Shasters* of *Mitheela* were to govern the succession, and that by them the party in possession being descended in the sixth degree in the paternal line was to be preferred to the maternal line: notwithstanding that part of the property was locally situate in *Bengal,* and that the last proprietor was domiciled there.

THIS was an appeal from a decision* on a question of *Hindu* law and usage: the point at issue being, whether the laws according to the *Shasters* or books of authority current in the district of *Mitheela* in the country of *Tirhoot,* (from whence the ancestors of the Respondents had originally emigrated, and the religion of which had been uniformly observed by his descendants,) were

* Reported 2 Mac. Sud. Rep. p. 11.

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to govern the right of succession to property from such ancestors, or the *Shasters* in use in *Gour Doss* or *Bengal*, where part of the property was situate, and in which district the party last in possession was domiciled.

Rajah Indur Narain Rae, the last male proprietor of the *Zemindary* of *Havila Parnea*, (the property in question,) was descended in a direct line, and related in the sixth degree to *Bigge Poomph Sumroo Chowdrey*, who originally emigrated from *Parnea*, the adjacent district of *Mitheela* or *Tirhoot*, to *Bengal*.

The *Rajah* having no children, the *Zemindary* descended on his death to his widow *Rannee Indrawutta* who continued in possession during her life, and died in 1803.

Immediately on her decease *Sree Narain* the father of the Respondents, and *Lullit Narain*, who were also descended in the sixth degree from *Sumroo Chowdry*, claimed to be the heirs of the late *Rajah*, and took possession of the *Zemindary*; but *Gunga Dutt* (the father of the Appellants) who was the nephew of the late *Rajah* by marriage, being the son of his wife's only sister, and as such the maternal first cousin of the late *Rajah*, claimed to be entitled according to the *Shasters* of *Bengal*.

In consequence of these adverse claims, *Gunga Dutt Iha* in the month of *January* 1805, commenced a suit in the Zillah Court of *Poorneah* for the recovery of the *Zemindary*, claiming, as the *khalatee* brother or first cousin of the late *Rajah*, to be his heir-at-law and personal representative; and as such entitled to his estates. He set up a claim also, which was afterwards abandoned, of having been adopted by the *Rajah*.

Sree Narain Rae and *Lullit Narain Rae* by their answer denied the title of *Gunga Dutt Iha* as *khalatee* brother of the *Rajah*, and insisted that the

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Shasters decided the inheritance to belong to them, as descended from a common ancestor with the *Rajah*; and they requested that the case might be decided according to the *Shasters* of *Tirhoot*, which were in usage in the country, and particularly amongst the *Brahmins* of *Mitheel*, who were entirely ruled by them.

To this *Gunga Dutt* replied, that on the authority of the *Rutnakur*, the most excellent of the *pothees* (or treatises) in usage in *Tirhoot*, and the *Bebad Chunder*, the rules of which are in usage in *Bengal*, his right was incontrovertible; he cited also various other authorities; and in order to show that the Defendants could have no right to the succession, as relations within the seventh degree to the *Rajah*, he alleged, that relations descended from a common grandfather, or to four descents, give the *pind* (or funeral cake) to the manes of their ancestors, which stops in the fifth: so that, the near relationship then ceases also.

The Defendants filed their rejoinder to this reply, citing various *Buchuns*, or texts of law-givers, in support of their title; they disclaimed the usages of *Bengal* and of the *Deccan*, and relied principally upon the authority of *Maha Maha Opediah Bacheesput*, *Misser* of *Mitheela*, the compiler of the *Bibad Chintamenei*, whom they represented as the most celebrated of the *pundits* of *Tirhoot*, and whose laws they stated, "are to this day venerated above all others by the *Mitheelas*."

Both parties exhibited and filed genealogical tables of their respective families, *Sree Narain* and *Lullit Narain* being lineally descended from *Sumroo Chowdry*, the paternal great grandfather of the great grandfather of *Rajah Inder Narain*.

It appeared that all religious ceremonies, as well as those of a civil nature, including marriage, were per-

formed in the families both of the Plaintiffs and Defendants, as well as in the family of the late *Rajah Inder Narain* by a *Mitheela purohit*,* according to the *Shasters* current in that district; and that the *Brahmins* of *Mitheela*, as stated by *Sree Narain* and *Lullit Narain* in their answer, were regulated in all things by the *Tirhoot Shasters*.

Previous to pronouncing a decision, the Zillah Judge, in order to ascertain the *Hindu* law of the case, referred the papers in the cause for the opinion of the *Pundit* attached to his Court, who returned the following *bewusta* or opinion.

" After an attentive consideration of the claim of *Gunga Dutt Iha*, as *khalatee* brother to the late possessor, and of that of *Sree Narain Rae* and *Lullit Narain Rae*, as being descendants in the seventh generation from a common ancestor with the deceased, I declare this *bewusta* according to the *Shasters*. *Inder Narain Rae* died, leaving neither son, grandson, or great grandson, and all his property came to his wife; and in the case of her having no relation within the affinity of her husband's brother's son (inclusive), *Sree Narain Rae* and *Lullit Narain*, who are *Sapinds*,† and heirs to her husband, succeed to the property, and these two persons being in existence, it cannot go to *Gunga Dutt Iha*, the *khalatee* (relation) brother of her husband, who is a *Bundhoo*.‡

" The arguments in proof of this are these.—The *buchun* (text) of *Juy Bulub Moonee*: ' If a person dies childless, first his property goes to his wife, then to his daughter, then the father and mother, then the brother, then the brother's son, then the *Gouteruj*,§

* Family Priest. † Kindred connected by the funeral oblation.

‡ Cognate kinsman.

§ Kindred of the same family opposed to *Bundhoo*.

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then the *Bundhoo*, then the disciple, then the fellow-student.'

"The *buchun* of *Bishun Moonee*: 'After his death it goes to the *Bundhoo*, after his death to the *Sookool*.'*

"In these two *buchuns* there are contradictions, and to reconcile these, *Bachisput Missur* has called the *Bundhoo*, *Sapinds*, and the *Sookools* he has called *Sugotur*.

"*Bodhaien Moonee*, after what he says respecting *Sookools*, adds: 'In case there is no *Sugotur Bundhoo*, the *Sookool* succeeds.'

"According to the *buchun* of *Juy Bulub Moonee*, first, own *Bundhoo*, then father's *Bundhoo*, then mother's *Bundhoo*, according to this series, inherit in the *pothee*† *Bibad Chintameni*.

"*Bachisput Misser* has this commentary: 'In case *if he* not existing, the brother, and the brother's son, and the *Sookools*, and *Sapinds*, and *Bundhoo*, and the disciple, and the *Bedereading Brahmins*, are heirs in succession. If there are many *Geants*,‡ and *Sookools*, and *Bundhoos*, and if there is no daughter, the *Sookools* and *Bundhoos* succeed.'

"Many *Moonees*§ have placed the *Sapinds* and *Sookools* before the *Bundhoos* as heir.

"*Buchun* of *Brishput Moonee*: 'If a person dies childless, and leaves no wife, no brother, nor father, nor mother, all the *Sapinds* shall divide the property, and take according to their shares.'

"*Kataien Moonee* says: 'After his death, all the heirs shall succeed.'—'In case there is no giver of

* Distant kinsman.

† Law Treatise.

‡ Or *kranuts*, kinsmen generally.

§ Sages.

pind to the possessor of property, the property goes to any person who gives the *pind*, and from him to the person who performs the same office for him. If they do not exist, or any one concerned in the *pind*, he will succeed;' *are* explanations which I have never seen in any *pothee* in usage in *Tirhoot*.

" On examining the *pothee Bibad Chintameni*, and *Bibad Chandur*, and others, it appears clear that the *Sapinds* are to the seventh generation (of seven descents), for *Bunhud Moonee* has written, the *Sapinds* are extinct in the seventh descent (inclusive of course)." Against this opinion *Gunga Dutt* produced three *bewustas* or law opinions signed by a number of *Pundits* of *Tirhoot*, *Benares* and *Nuddiah*, whereupon the Zilla Judge ordered the documents filed on either side to be forwarded to the Provincial Court at *Moorshedabad* for the opinion of the *Pundits* of that Court. The *Pundits* of the Court at *Moorshedabad* differed in opinion with those of the Zillah Court, and made the following report:—

" The widow of *Indur Narain Rae*, deceased, named *Rannee Indrawuttee*, came into possession of the property left by her late husband at his death. The *puttas* which decide the succession in favour of the *khalatee* relation of her late husband, in preference to the relations of the seventh descent from a common ancestor, are just, and according to the *Shasters*.

" Proof.—The father, grandfather, and great grandfather, and in like manner maternal grandfather, great grandfather, and his father, have *pind* and *jul** offered to them; the fourth is the giver, and the fifth has no concern in the giving or receiving *pind*. Of these, he

* Funeral oblation, and water libation.

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who is nearest *Sapind*, will be heir to the property; after him, the *Sookools*, the *Acharuj*, and the *Shish*;* where there are many *Grants*, and *Sookools*, and *Bundhoos*, he who is nearest will succeed to the property of a childless person; and in the case of there being no nearer *protreety*, the heritage comes to the nearest *Sapind*; the great grandfather, grandfather, father, self, with own brother's son of a wife of same tribe, grandson, and his son, are joint *Sapinds*, in an undivided property; but if it is divided, are *Sookools*: if there are no offspring, the *Sapinds* succeed; if there are no *Sapinds*, the *Sookools*. As far as the connexion of *pind* extends to a common ancestor, so far do the *Sapinds* go; and when they are remote from *pind*, they are remote also from *sapindee*: in case of a division of the property, the *leep*† tasters are *Sookools*.

"The texts of all these *buchuns* are inserted in the *pothees Rutnakur*, and others of *Mitheela*, composed by *Menu* and *Brishput Oupust*, *Bohaien Debul*, the *Brinch Pooran*;‡ therefore the *khalatee* relation is the giver of the *pind*.

"The *bewusta* which have decided in favour of the *Sookools*, or descendants of the seventh generation from a common ancestor, in preference to the *khalatee* relation, are improper, and contrary to the text of *Menu*, and all texts and *Shasters* contrary thereto are of no authority, for he wrote according to the *bedes*;§ he is, therefore, above all. Thus, according to the *Shasters*, *Gunga Dutt Iha*, the Plaintiff, is rightful heir."

Against this last opinion it was alleged by *Sree*

* A spiritual guide or teacher. † Remnant of oblation.

‡ *Poorana's* or sacred books. § The Vedas or Holy Scriptures.

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Narain and *Lullit Narain*, that the *Pundits* of the Provincial Court had only consulted the *Shasters* in usage in *Bengal*, which did not regulate the succession and inheritance of families in *Tirhoot*. Under these circumstances the Zillah Court deemed it necessary to resort to further authority, and ordered the proceedings to be transmitted to the Sudder Dewanny Adawlut of *Bengal*, with a request that the *Pundits* of that Court might be directed to examine the various *bewustas*, and decide which was just and right according to the *Shasters*.

The Sudder Adawlut accordingly referred the question and the *bewustas* to their law-officers, who delivered the following opinion:—

"*Rannee Indrawuttee*, widow of *Indur Narain Rae*, having deceased, leaving no brother of the *Rajah*, or son of the said brother alive, we conceive the property of which she died possessed, in right of the *Rajah*, to be the right of *Sree Narain Rae* and *Sullit Narain Rae*, the Defendants, as *Sapind* and heirs to her said husband. The *bewusta* to this effect, passed on the authority of the *Bibad Chintameni* and other books, and the uses of *Mitheela* is correct; and that which asserts the right to come to *Gunga Dutt Iha*, the *khalatee* brother or *Bundhoo*, is not allowable by the *Shasters* of *Mitheela*, but is so according to the *Dye Baugh* and *Dye Tuth*, the *poothees* in usage in *Gour Doss* or *Bengal*. In proof of this, *Bishun Moonee* writes: Of a person who dies childless, the succession of his property devolves first to his wife, then to his daughter, then his mother, then the father, then his brother, then brother's son, then the *Bundhoo*, then the *Sookool*, then the fellow-student, then (exclusive of the property set apart for pious purposes) the state.

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" According to the *Bibad Chintameni*, the *Bundhoo's* are *Sapinds*; *Sookools* means *Humgotur*, or descended from a common ancestor.

" Again, *Brishput Moonee* says, from self to seven generations are *Sapinds*, beyond *Sapinds* are barred. From self upwards to fourteen *pooshts* are called *Sumanoduca*, who are of the same seed, next to them come the *Sugotur*.

" The abstract of this from the *Bibad Chintameni* is this: First the son, then the grandson, then his son, then the wife, the daughter, then the mother, then the father, then the brother, then brother's son, then the near *Sapind*, then the remote, then the near *Sookools*, then the remote: there is default of all these, and exclusive of the portion for pious purposes, the persons of the mother's family have right of succession.

" Again, according to *Sree Kur Misser*, if a person dies childless, his property becomes the right of the descendants of his father; if they exist not, grandfather's offspring, then the offspring of the great grandfather. This is thus proved: three generations give *pind* and *jul* —that is, three generations from self; the fourth is the giver, and the fifth has no concern therewith. After these, he who is nearest heir must succeed. The proof of this is, in case there are no *Sapinds*, the *Sookools* succeed; after them, the nearest relations, according to their *sinees*; as upon the authority of all these texts above quoted it is proved. The relative situations of the *Sapind Sumanoduca Goutery*, or descendants from the same stock, is stated above.

" *Ball Roop* writes :—' If there is no relation within the brother's son inclusive, the *Grants* of the same common ancestor will inherit; in proof of which is

this. First the heirs, as far as the brother's son; then the *Goturuj* heirs, *i. e.*, of one stock; then the *Bundhoo*: the meaning of *Goturuj* is he who is a *Sapind.*'

" The text of *Menu* is thus :—' *Goturs* reach to six generations, *Sapinds* to seven, which is thus explained: That six generations and their offspring are *Goturuj* and *Sapinds*; and that from the deceased father, including his grandfather and great grandfather, and in ascent up to the seventh generation, are *Sapinds* and *Goturuj*; and in like manner seven generations in descent are *Sapinds* and *Goturuj*. In support of this it is said, *pind* may be given, from self up to great grandfather, and three generations above that are eaters of the *pind leep*, and from the giver for seven generations are they named *Sapinds* in these generations. This is the relationship and connexion: If there are no *Sapinds*, the *Sumanodukas* succeed to the inheritance, which word means all the generations above the *Sapinds*, of which the memory remains.'

" This is supported by the text of *Buchun Moonee*, who says that the *Sumanodukas* are *Humgoturs*, and if there are no *Goturs*, the *Bundhoos* inherit; that the *Bundhoos* are of three kinds—first, own *Bundhoos*; second, father's *Bundhoos*; third, mother's *Bundhoos.*

" In the *Seetee Sar Gurint*, according to the text of *Oupent Moonee*, we found these words: ' In the event of there being no son, the *Sapinds* are heirs,' and the interpretation of near *Sapind* is thus given: ' Great grandfather, grandfather, and father, self, own brother, son by a wife of the same tribe, grandson, his son, are, in an undivided inheritance, *Sapinds*; but if said inheritance be divided amongst the heirs, they are

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Sookools. If a person has no offspring, the heritage goes to the *Sapinds*; and if there are no *Sapinds*, to the *Sookools*; if they are not, it goes to the *Acharuj*; if he is not, to the disciple; if he is not, to the *purohit*; if there is none, the whole (exclusive of *Brahminical* property) to the state.'

"The *Tan Ooktan*, or those whose name have been mentioned above, respecting whom has been explained the rights of *Sapind* and *Sookool*; said explanation is in cases of the division of inheritance, and bears no reference to *asoch*,* in which all who are of one blood are *Sapinds*, as well as those merely connected. Abstract of the text:—'A person dying childless, his wealth goes to his father and his descendants as far as the grandson; if none exist, it goes to his grandfather and his descendants; if none exist, to the great grandson and his descendants; and so on to the seventh in ascent, after which right of inheritance ceases.'

"According to the *Brinch Pooran Shaster*, in the whole *Hindu* race, *Sapinds* are to the seventh generation; after which they are *Sumanodukas*, who go up as far as the memory of the family exists. If self, father, grandfather, and great grandfather, with seven generations in ascent from him, and from him also, down to the great grandson, seven generations in descent (the seventh of whom is said great grandson), are dead, except said great grandson, and the property has not been divided, said great grandson is *Sapind*; and if the property shall have been divided, is *Sumanoduka*, but all who eat of the *pind leep* are *Sumanodukas*, and those who eat the *pind* are *Sapinds*.

"*Bodhaien Moonee* says:—'He is a *Sapind* in cases

* Impurity attaching on the birth or death of a relation.

where the property has not been divided, and *Sookool* where it has.' His explanation refers to the rights of *Sapinds* and *Sookools*, in a case of inheritance to the property of a childless person.

" In the *Rutnakar* text of *Menu* is found :—' The act of *Sapindee* ceases at the seventh generation, and the *Sumanoduka* extends therefrom to the further annals of the family.' Thus explained, seven generations above the person living, and all their offspring, are *Sapinds*; and in the *pothees Parajat*, also, it is written, that the word seventh bears reference to the founders of the seven generations above, and all their descendants who are mutually *Sapinds*.

" In the *Much Pooran* :—' From the fourth generation (in ascent) they are *leep* partakers, and from the father to three generations partakers of *pind*; the giver of which *pind* is the seventh.'

" Text of *Sumunt Monnee* :—' *Brahmins* who are of one *pind* suffer *asoch* for ten generations. After three generations *pind* ceases, and after, or in the seventh generation, right of heritage ceases; that is, after seven the property left is not divided. If this *asoch*, &c., is not performed, the punishment is equal to the slayer of a *Brahmin*; or he who has relation of *pind*, his *asoch* ceases at the tenth generation. He whose father, grandfather, and great grandfather are living, great grandfather's father, and two ascents more, are partakers of the *leep*. All this refers to *asoch*.'

" In the *Brinch Pooran* it is thus written, and in the translation thereof in the *Seetee Sar*; but this is the explanation given thereof in the *Rutnakara*: —' In all tribes of *Hindu*, from self upwards to the seventh ascent, and from the great grandfather to great grandson, seven descents, both in ascent and

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descent, seven generations are *Sapinds*; after whom are the *Sumanodakas*. This enumeration is repeatedly written, and according thereto, the *Sapinds* extending upwards seven generations are heirs to an undivided property; whilst those who have right to a divided one are *Sookools* and *Sumanodakas*. This is not the case in all places; but in some, he who partakes of the *leep* comes into the property, who, in case of a division, are *Sookools* and *Sumanodakas*, whilst those who partake of *pind* are, even in case of a division, *Sapinds*; and *Sapinds*, as above enumerated, succeed to property.'

"*Bodhaien Moonee* says, 'Great grandfather, grandfather, father, self, own brother, son of a wife of same tribe, grandson, and his son, all, if the property is undivided, are *Sapinds*; and if divided, *Sookools*. In order to ascertain the right of inheritance to the property of a childless person, deceased, this is the explanation of *Sapinds* and *Sookools*; for in the matter of division of property left it is written thus.'

"The explanation of the *Bibad Chander* is thus:—'The property of a childless person goes to his wife; if he leaves none, to his daughter; if he has none, to his father; then to the mother, then to the brother, then the *Sugotur*, then the *Bundhoo*, then the disciple, then (exclusive of *Braminical* property) to the state, who will give such *Brahminical* property to the Bede-reading *Brahmins*; and amongst the *Sugoturs* the nearest will succeed; because where there are many *Geants*, and *Sookools*, and *Bundhoos*, the nearest will inherit the property of a childless person.'"

The Zillah Court having received the above *bewusta*, confirmatory of that delivered by the *Pundit* of their own Court, on the 16th of *September* 1808, after reca-

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pitulating the circumstances of the case, pronounced their decree, and ordered "that the plaint should be dismissed, and that the Plaintiff pay the costs of suit."

On the 1st of *February* 1809, the Plaintiff *Gunga Dutt* appealed from this decree to the Provincial Court of Appeal for the division of *Moorshedabad*. In his petition to that Court, he represented that the *Pundits* of the Provincial Court at *Moorshedabad*, as well as the *Pundits* of the Sudder Dewanny Adawlut, upon the reference to them, had severally decided that the usages of *Gour* or *Bengal* were in favour of the Plaintiff; that the *Zemindary* in dispute was in *Gour*; and that the deceased *Rajah* for ten generations had been settled in *Gour*; he submitted that in all affairs the *Shasters* of *Gour* must govern the customs of *Gour*, and insisted that his right was clear, not only according to all those *Shasters*, but also according to the authorities of the *Rutnakur* and *Sumrit Sur* in usage in *Tirhoot*.

Sree Narain Rae and *Lullit Narain Rae* put in their answers to this Appeal, alleging that the *Pergunnah* of *Havelee Poorneah* was in fact in *Tirhoot*, and that, according to all *Pothees* prevalent in *Tirhoot*, the right to the inheritance had devolved upon them.

On the 4th of *September* 1809, the Provincial Court entertaining some doubts on the law, ordered that copies of the proceeding, together with the original *bewustas* of the *Pundits* of the Sudder Dewanny Adawlut, be again sent to that Court for their further opinion.

The *Pundits* accordingly reviewed the proceedings, and the *bewustas* delivered in this cause, and gave the following opinion:—

"Upon an examination of the various *bewustas*, it appears to us that, according to the *Shasters* of usage

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in the country of *Mitheel*, whenever inhabitants of that country, who carry on their affairs according to the usages of the said country, happen to have a dispute, it is proper that the Judge do decide in the dispute agreeably with the institutes of the *Shasters* of that country; and that when disputes arise between inhabitants of *Gour*, or those who carry on their affairs according to the *Shasters* of that country, or *Malda Tajpoor*, &c., he shall decide according to the *Shasters* of *Gour*. Upon this principle, in the dispute between *Gunga Dutt Iha*, v. *Sree Narain Rae* and *Lullit Narain Rae*, *Mitheelees*,* the *pothees* in usage in *Poorneah* bear strongly, *viz.* the *Bibad Chintamonee*, the *Bibad Chundur*, the *Rutnakur*, the *Sumrit Sur*, compiled by *Bal Roop* and *Three Krepae*, and according to the *bewustas* of the *Shasters*, the inheritance of *Rajah Inder Narain Rae* should rest in *Sree Narain Rae* and *Lullit Narain Rae*.

" 2nd. Answer of *Soolpanee*, the *Pundit* of the Zillah Court, is according to the *Shaster* of *Gour Doss*, and not according to those of *Mitheel*.

" 3rd. In answer to the *bewustas* of *Suboor Tewarree* and *Gunsam*, *Pundits* of the Sudder, it is written, that they have passed their *bewusta* according to the *Bibad Chintamun*, the *Shaster* in use in *Poorneah*; for they have merely written, that according to the *Shasters*, &c., and have not written according to the *Shasters* in usage in *Gour Des*; but, moreover, they have written, that *Sree Narain* and *Lullit Narain*, the relations of the seventh descent, are rightful heirs to the property of the deceased *Rajah*; and according to the *Dhye Bhaga*, the relations of the seventh descent, who are *Gotur Chow*,† are heirs, they have not then written.

* Inhabitants of *Mitheela*.

† Family, &c.

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" 4th. They have not written after whom, who is to inherit.

" 5. The *Bejye* neither, and other *Girunts*, are in usage in *Benwus*, and the *Daya Bhaga* in *Gour Doss*."

On the 9th of *December* 1809, the *bewusta* of the *Pundits* of the Sudder Dewanny Adawlut, with the various *bewustas*, having been received, the Provincial Court declared, " that upon an examination of the same it appeared that the *Pundits* had decided that, according to the *Shasters* in usage in *Poorneah*, the *Bibad Chintamenei*, *Bibad Chundur*, and *Rutnakur Sumrit Sur*, in usage in *Mitheel*, and various other *Shasters*, the claim of *Sree Narain* and *Lullit Narain* was preferable." And the Court accordingly decreed against the Plaintiff's claim, and affirmed the Decree of the Zillah Court with costs.

Soon after the date of this decree, *Lullit Narain Rae* died, without leaving any children, but leaving his widow, *Mussumut Leelawattee*, who was admitted as his representative in the further proceedings in the cause.

On the 20th *April* 1810, *Gunga Dutt Iha* appealed from the above decisions of the Zillah and Provincial Courts to the Sudder Dewanny Adawlut at *Bengal*, and *Sree Narain Rae* and *Mussumut Leelawattee* respectively put in their answers to the petition of appeal.

At the hearing of the appeal, it appeared that a decree of the Sudder Dewanny Adawlut, dated the 22nd *June*, 1801, had been made in a cause of *Rajunder Narain Chowdree* v. *Goculchund Goh*,* in which it was determined that if a person of a *Mitheela* family living

* Reported 1 Mac. Sud. D. Rep. 43.

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in *Bengal* continue the observance of the *Mitheel Shaster* on occasion of marriages and mournings in his family, and have a *Mitheela Purohit*, or priest, to perform the ceremonies, his right to inheritance and other claims were to be determined according to the *Mitheela Shasters*; but that if these ceremonies were performed by him according to the *Bengal Shasters*, his right of inheritance should be determined by the *Bengal Shasters*.

In conformity with this decree, and with the opinion of the *Hindu* law officers, and finding that it was admitted on the part of the Appellant *Gunga Dutt Iha*, upon the question being put by the Court, that the *Purohits* or priests of all parties in the present case, were *Mitheela* men, and that the marriage and mourning ceremonies were observed by them according to the *Mitheela Shasters*, the Judges of the Sudder Dewanny Adawlut were of opinion that the case was to be decided by the *Mitheela Shasters*, and in order more clearly and finally to ascertain the rights of the parties according to those *Shasters*, the Court, on the 16th of *February* 1812, directed a reference to the *Pundits* of the Zillah Court of *Tirhoot*, which was in the district of *Mitheel proper*, and to the Provincial Court of *Patna*, in order to obtain the opinion of the *Pundits* of those courts, they being the persons most versed in the *Shasters* current in the *Mitheela* tribe and district, upon the following question: "In the case of a person of the *Mitheel* tribe dwelling in *Bengal* (in whose family, through *Purohits* of the *Mitheel* tribe, the observances of joy and of grief have been in usage according to the *Mitheel Shasters*) dying and leaving persons related to him in the sixth descent his *Humgoters*—that is, the descendants children of his great

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grandfather's great grandsire—and also leaving the son of the sister of his mother, with no other nearer heirs than these living; to which of these persons, that is, the descendant in the sixth degree, or the mother's sister's son, does the right of inheritance to the real and personal property of the deceased belong?"

In answer to this question, the *Pundits* delivered a *bewusta*, which declared, that according to the *Mitheela* authorities, the estate of a person, on failure of heirs within the relation of brother's sons, devolved on the paternal kindred, who are *Sapinds*, including descendants of a paternal ancestor to the sixth degree; and in default of *Sapindas* it devolved on the *Sanconodaes*, or more distant paternal kindred extending to the fourteenth degree, and that in failure of *Sanconodaes* the *Bundhoos*, or maternal kindred, succeeded; and that therefore *Sree Narain Rae* was the nearest heir as *Sapinda*; the Appellant *Gunga Dutt Iha* being of the class of *Bundhoos*.

This opinion having been duly received, the Sudder Dewanny Adawlut on the 23rd *March* 1812, ordered, that the papers in the cause should be laid before the third Judge, for his opinion.

On the 6th of *April* following, the Plaintiff, with permission of the Court, filed a petition, protesting against the *bewustas* of the *Pundits* of the Zillah Court of *Tirhoot* and the Provincial Court of *Azeemabad*.

Mr. Harrington, the first Judge, investigated the opinions of the various *Pundits* delivered in the cause, and after some delay pronounced the following elaborate opinion.

"The decision of this cause rests entirely upon a point of *Hindu* law, whether Appellant, as maternal first cousin of *Rajah Inder Narain* (*viz.* of the sister of

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Inder Narain's mother), be the legal heir to the estate of *Inder Narain*, vacated by the death of his widow, *Ranee Indrawuttee*, or whether, on the *Ranee's* death, the right of succession to her husband's estate devolved to *Sree Narain* and *Lullit Narain*, lineally descended in the sixth degree from *Sumroo Chowdry*, also called *Somer Sing*, ancestor in the sixth degree of *Rajah Inder Narain*, *viz.* his paternal great grandfather's great grandsire.

" 2. The *Pundits* of the Zillah Courts of *Poorneah* and *Tirhoot*, of the Provincial Court for the division of *Patna*, and of the Sudder Dewanny Adawlut, concur in declaring that, according to the received and most authoritative books of law of the *Mitheela* or *Tirhoot* system (by which the parties, though resident within the limits of *Bengal*, are regulated in their religious ceremonies, marriages, &c.), the paternal kindred are entitled to succeed before the maternal; and, consequently, Appellant (the Plaintiff in this cause) has no legal right to the succession claimed by him.

" 3. In support of this opinion the following authorities are cited (besides others less conclusive), which expressly declare a preference of the *Gotraja* kindred of the same *Gotr*, or paternal stock, to the *Bandhu* or kinsman of a different stock, namely, the maternal kindred and the issue of daughters married into another family.

" 1st. A passage of *Yajnyawalcya*, cited in the *Mitacshara*, chapter 2, sec. 1, par. 2: ' The wife and the daughters also, both parents, brothers likewise, and their sons, the paternal kinsman (*Gotraja*), kinsman of a different family (*Bandhu*), a pupil and a fellow student; on failure of the first among these, the next in order is heir to the estate of one who is deceased,

leaving no male issue. This rule extends to all persons and classes.'

" 2ndly. The *Mitacshara* itself, which declares the order of succession according to the above text (see page 324 of Mr. Colebrooke's Translations), and afterwards in two distinct sections (5 and 6 of chap. 2), the one entitled ' succession of kindred of the same family name, termed *Gotraja*, the other on the succession of *Bandhu*, or kindred of a different family name,' states the order in which the paternal and maternal kindred are to succeed respectively. From these, it will be sufficient to extract the commencement of each section, *viz.* ' If there be not even brother's sons, the *Gotraja*, or more distant paternal kinsman (translated by Mr. *Colebrooke* Gentiles), share the estate. On failure of Gentiles, the *Bandhu*, or kinsman of a different family (translated *Cognates*), are heirs.' For the remainder of the *Mitacshara*, as applicable to the case, I beg to refer to the translation of that work, pages 349 to 352, including also in notes the explanations of commentators, and sentiments of other writers upon the subject.

" 3rd. The *Vivada Chentameni*, the author of which, after citing different authorities on the order of succession, gives the following recapitulation.

" The abstract is this: First the son, after him the grandson, then the great grandson; on failure of these, the virtuous wife; failing her, the daughter; in her default, the mother; if she be dead, the father; if he be so, the brother; on failure of him, his son; in default of him, the near and more remote *Sapinda* or kindred, connected by the funeral oblation (for want of such *Saculya*, also called *Samanoduca*), or those connected by a common libation of water, in order;

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on failure of them, the mother's family (*Matrical*) and the rest; and default of all, the King, excepting the property of a *Brahmin*.

" 4th. A passage from *Balarupa*, referring to the text of *Yajnyawalcya* above cited, in proof that on failure of him down to the brother's son, the succession devolves on the *Gotraja*; and after explaining it as meaning the *Sapindas*, and comprising six ancestors and their issue, concluding with the following quotation from *Virhut Menu*: the relation of *Sapinda* ceases with the seventh person, and that of the *Samanoduka* extends to the fourteenth degree. The *Samanoduka*, too, are *Gotraja* (or paternal kinsman); on failure of such, the succession devolves on the *Bandhu* (or kinsman of a different stock), conformably with the text of *Yajnyawalcya* above cited, *Gotraja*, *Bandhee*, &c.

" 5th. The following extract from the *Vivada Chandra*:

" The wealth of one dying without male issue goes to his wife; if he leave none, it goes to his daughter; if there be none, it devolves on his father; if he be dead, it passes to the mother; if she deceased, it comes to the brothers; in default of brothers, it goes to the *Sagotra*; for want of such, it descends to the *Bandhu*; on failure of whom, it accrues to the disciple; if there be none, it goes to the King, except to the property of a *Brahmin*. Among *Sagotras* the nearest shall take property of the childless man; conformably with text of *Vrihaspate* and quotations from the *Shasters*, where many claim the inheritance of a childless man, whether near or distant paternal kindred or kinsmen, or of a different stock (*Geanli*, *Saculya*, or *Bandhu*), he who is the nearest of them shall take estate.

" 6th. A text from *Apostamba*, cited in the *Chin-*

tàmeni, importing that if a person die childless, his estate, moveable and immoveable, goes to his *Sapinda*; if there be no *Sapinda*, to his *Saculya*; if there be no *Saculya*, to his *Bandhu*.

" 4. These last text is quoted by the *Pundit* of the *Patna* Provincial Court, and the *Pundit* of the Zillah Court of *Tirhoot*, but not by the *Pundits* of the Sudder Dewanny Adawlut, who cite only from the *Sumrit Sara* another dictum of *Apostamba*, that on failure of male issue, the nearest *Sapinda* is the heir.

" 5. *Jimuta Vahana*, the author of the *Daya Bhaga*, considering a text of *Menu*, which directs that the inheritance be given ' to the nearest *Sapinda*,' or those who are connected by funeral oblations, to refer not so much to nearness of kin or family relation, as to the presentation of offerings, and that the maternal uncle and other maternal kindred present oblations to the maternal grandfather and other ancestors, which the deceased was bound to offer when living, and consequently partakes when offered by others after his death, declares them entitled to succeed on failure of near *Sapinda* among the paternal kindred, *viz.*, ' on failure of any lineal descendant of the paternal grandfather, down to the daughter's son, who might present oblations in which the deceased would participate.' He adds, that on failure of such maternal kindred, *viz.*, those who offer oblations which the deceased was bound to present, and of which he partakes when presented by others after his death, the *Saculya* or distant paternal kinsman is the successor, and defines the ' *Saculya*' to be ' one who shares a divided oblation, as the grandson's grandson, or other descendant within three degrees reckoned from him, or as the offspring of the grandfather's grandfather, or other re-

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moter ancestor.' (See Mr. *Colebrooke's* Translation of the *Daya Bhaga*, pages 216 to 219; and the rule, that he who while living presents an oblation to an ancestor, partakes when deceased of oblations presented to the same person, in page 171.)

" 6. This order of succession, however, which has been adopted in *Bengal*, and which *Nauda Paudila*, a modern author, is desirous of extending to *Benares*, in opposition to *Camalacara* and the author of the *Viramitorodya*, who follow the *Mitacshara* (see note to Translation of *Mitacshara*, pages 350 and 351), is not admitted by the *Mitheela* school, who uniformly prefer the paternal to the maternal kindred, whilst any of the former, or at least any within the fourteenth degree, may be living. In the *Bengal* law of inheritance, a *pind* or oblation at obsequies is chiefly regarded in *Mitheela* the *Gother* or relation of the same family. This point appears to me incontrovertibly established by the authorities cited in the *bewustas* of the law-officers of this Court, the Zillah Courts of *Poorneah* and *Tirhoot*, and the *Patna* Provincial Court, and I see nothing whatever to prove the contrary. The *bewusta* of the *Pundit* of the *Moorshedabad* Provincial Court, which is founded on his own construction of texts that are cited by the under *Pundits* to prove the opposite doctrine. The whole of the objections of Appellant to the *bewustas* in favour of the distant kindred of *Rajah Indur Narain*, also appear to me unfounded or irrelevant to the present case, in which the contest is not between a *Sapind* and *Saculya*, both of the paternal kindred, but between a paternal and maternal kinsman.

" 7. In Appellant's replication in the Zillah Court, he states his claim to be supported by a text of *Vrihas-*

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pate, cited in the *Vivada Chandra*, importing that when there are several claimants, of whom some are paternal and others maternal kinsmen, whichever may be nearest in affinity shall succeed to the estate; but the extract above given from the *Vivada Chandra* shows that the author of this work, which is held authoritative in *Mitheela* (see Preface to Translation of *Daya Bhaga* and *Mitacshara*), expressly prefers the *Sagotra* to the *Bandhu*; and the text cited from *Vrihaspate*, which is also relied upon by the *Pundit* of the *Moorshedabad* Provincial Court, is constructed to mean only that among several kinsmen, whether paternal or maternal, who may claim an estate, those of each who may be nearest of kin are entitled to succeed, in preference to the more distant. In his petition of appeal to this Court, Appellant cites the *Rutnacara* and *Smrite Sara* to prove that *Sree Narain* and *Lullit Narain*, not having descended from an ancestor of *Rajah Indur Narain* within the third or fourth degree, are not *Sapindas*. But the author of the *Rutnacara*, after citing a text from *Menu*, saying—'The relation of *Sapinda* ceases with the seventh person, and that of *Samanoduca* reaches as far as memory of birth and name extends,' adds, according to the signification of the word *Sapinda*, as deducible from its etymology, it comprehends the offspring of the seventh person; and he adduces the authority of the *Matsyapurana* to prove that 'the relation of *Sapinda* extends to the seventh degree.' In the *Smrite Sara* also, although reference is made to a text of *Bandhayana* (see translation of the *Daya Bhaga*, chap. ii. sect. i. part 37), in which those partaking of undivided oblations are pronounced '*Sapinda*,' whilst those who share divided oblations are called '*Saculyas*;' yet this very text adds, 'on failure of *Sapindas* or near

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kindred, *Saculyas* or remote kinsmen are heirs;' and the author of the *Smrite Sara* himself expressly adds, 'The wealth of one who leaves no male issue goes to his father and his offspring; on failure of offspring of his father, the succession devolves on the paternal grandfather and his offspring; on failure of issue of the paternal grandfather, it goes to the paternal great grandfather and his offspring, in regular order, and so on to the seventh degree.'

"8. As to the further argument of Appellant in the representations delivered through his *Vakeel* and *Mokhtar*, on the 18th *February* last and 6th instant, in which he endeavours to show that his claim is supported by the *Mitacshara*, it appears to me, on a careful examination of the English version, which we happily possess, of that work, to be totally without foundation. I have already noticed the two sections which declare the succession of the *Gotraja*, or paternal kindred, before the *Bandhu*, or kindred of a different stock, and which in my judgment are conclusive against the Appellant, who acknowledges himself to be one of the *Bandhu* of *Rajah Indur Narain*, and claims as his maternal first cousin.

"9. The term *putra*, or son, in the *Mitacshara* and its commentary, the *Sabodhene*, is frequently used as a generic term for male issue or descendant, and must be so construed in several parts of the *Mitacshara*, or the grandson, as well as the great grandson, would be excluded from the immediate succession, though acknowledged in every system of *Hindu* law to represent their deceased father and grandfather, and entitled with sons to share the estate of a person leaving sons, grandsons, and great grandsons, the father of the grandson and father and grandfather of the grandson

being previously dead. This principle appears to be recognized in the *Mitacshara* and both its commentaries, in the third paragraph of the introductory section and notes referring thereto (see page 242 of Mr. *Colebrooke's* Translation). In that paragraph, after stating that 'the wealth of the father, or of the paternal grandfather, becomes the property of his sons or of his grandsons, in right of their being his sons or grandsons, and this is an inheritance not liable to obstruction,' it is immediately added, 'but property devolves on parents or uncles, brothers and the rest, upon the demise of the owner, if there be no male issue, and thus the actual existence of a son and the survival of the owner are impediments to the succession; and on their ceasing, the property devolves on the successor, in right of his being uncle or brother: this is an inheritance subject to obstruction. The same holds good in respect to their sons and other descendants.' Here it is manifest the words translated 'male issue,' and 'a son,' were not meant to exclude the grandsons before mentioned, and the two commentators agree in construing the last clause to intend 'the sons or other descendants of the son and grandson.' The same construction must, I think, be put on the words 'sons' and 'issue' (*putra* and *sunava*), in the fourth and fifth paragraphs of the fifth section, and second chapter of the *Mitacshara*, and this interpretation is indeed indicated by expressions on the same paragraphs; *viz.* 'on failure of the father's descendants' (*santana*), and 'on that of the paternal grandfather's line' (*santana*). To adopt the construction proposed by the Appellant would be to cut off all the descendants below the grandson of the father, grandfather, and every other ancestor, and would render nugatory

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the provisions in *Mitacshara*, as well as in the other books of law, which expressly state 'the succession of kindred belonging to the same family, and connected by funeral oblations to the seventh degree; or if there be none such, the succession devolves on kindred connected by libations of water, and they must be understood to reach to seven degrees beyond the kindred connected by funeral oblations of food, or else as far as the limits of knowledge as to birth and name extend.' (See Translation of *Mitacshara*, chap ii. section v. par. 5 and 6.)

"10. It may be added, that the Respondent, *Sree Narain Rae*, as descendant in the sixth degree from *Sumroo Chowdry*, the ancestor of *Rajah Indur Narain*, does actually make oblations to the manes of ancestors, in which those of *Indur Narain* are supposed to participate, and consequently that he is not only of the same family or paternal stock as *Indre Narain*, and related to him within the seventh degree, but is also connected with him by oblations to a common ancestor, in which the manes of *Indur Narain* are supposed to participate; which notion, to use the words of the late Sir *William Jones* (see note in Translation of Digest of *Hindu* Law, vol. iii. par. 146), is the key to the whole Indian law of inheritance.

"11. Sir *William Jones* further observes, 'that for this reason the law of obsequies promulgated by *Menu* must be carefully studied.' And it will accordingly be found on reference to the third chapter of *Menu* (which contains the law of obsequies), text 216, that 'the person offering three balls or cakes to the manes of his father, his paternal grandfather, and great grandfather, is directed to wipe the same hand with the roots of *cusa*, which he had before used for the

sake of his paternal ancestors in the fourth, fifth, and sixth degrees, who are partakers of the rice and clarified butter thus wiped off.' This explains another text of *Menu* (chap. v. text 60), in which it is stated, 'that the relation of *Sapindas*, or men connected by the funeral cake, ceases with the seventh person, or in the sixth degree of ascent or descent,' which, without attention to the distinction between complete oblations of the *pind* or funeral cake, made to the manes of the three nearest ancestors, and the wipings (*leep*) received by the three more remote ancestors, would appear at variance with a third text in chap. ix. text 186. 'To three ancestors must water be given at their obsequies; for three (the father, and his father, and the paternal great grandfather) is the funeral cake ordained; the fourth in descent is the giver of oblations to them, and is their heir if they die without nearer descendants; but the fifth has no concern with the gift of the funeral cake.' The three texts of *Menu* above cited are perfectly reconcileable, without supposing (as some authors have done) the second text to relate to *Sapindas* required to mourn for a deceased person, not to his heirs. And a fourth text, which follows that last quoted, and directs that, 'to the nearest *Sapinda* male or female, after him in the third degree the inheritance next belongs; then, on failure of *Sapindas* and of their issue, the *Samanoduka*, or distant kinsman, shall be the heir,' prove that not only other *Sapindas* beside the son, grandson, and great grandson, but their descendants also, are included by *Menu* among the legal heirs.

" 12. The only shadow of pretension which appears left to the Appellant is that which he has further urged, of the estate in dispute being partly situated within the

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limits of the province of *Bengal*, and of the late *Rajah* and *Ranee*, as well as the parties in this cause, being resident within that province. It is, however, acknowledged by Appellant that all ceremonies of mourning and rejoicing (*viz.*, all religious ceremonies, and some of a civil nature, including marriage), are performed in the families of both Appellants and Respondents (as they were in the family of the late *Rajah* and *Ranee*, whose ancestors came into *Poorneah* from the adjacent districts of *Mitheela* or *Tirhoot*), by a *Mitheela purohit* or priest, and according to the *Mitheela Shaster*. It appears too that *Roojput Iha*, the son of Appellant, has succeeded (under a summary decision of the Judge of Zillah *Poorneah*, passed on the 27th *November* 1809), to the estate of *Madho Dai*, half sister of *Rajah Indur Narain*, as her *Kirta Pooter*, which form of adoption is not sanctioned by the current law of *Bengal*. And in a former cause before this Court (that of *Rajchunder Narain*, Appellant, and *Goculchund Goh*, Respondent, decided 22nd *June* 1801), it was determined on a *bewusta* of the *Pundits*. In chap. viii. of *Menu's* Institutes on Judicature and Law, it is prescribed in text 41, that 'a king who knows the revealed laws must inquire into the particular laws of classes, the laws of usages of districts, the customs of traders, and the rules of certain families, and establish their peculiar laws, if they be not repugnant to the law of God; that if a person of *Mitheela* family, resident in *Bengal*, have *Mitheela purohit*, and perform his domestic ceremonies of mourning and rejoicing, according to the *Mitheela Shaster*, his right of inheritance is governed by the *Mitheela Shaster*, or *vice versâ*.'

"13. On the whole, therefore, I see no ground

whatever for altering the decrees of the Zillah and Provincial Courts in this cause, whereby the claim of Appellant was declared inadmissible, and am of opinion that his appeal to this Court should be dismissed with costs."

On the 24th of the same month, the opinion and result of the First Judge's investigations having been made known to the Third Judge, the cause came on for decision; when both Judges declared themselves of opinion that there was no sufficient cause exhibited for altering the decisions of the Zillah and Provincial Courts, because "it was clear that at the time of the death of *Ranee Indrawuttee*, the widow of *Rajah Indur Narain*, the Respondents, *Sree Narain Rae* and *Lullit Narain Rae*, the descendants of *Sumroo Chowdry*, the great grandsire of the great grandfather of *Indur Narain*, with others, his *Hungotur* relations, were in existence; while the Appellant, the son of the sister of the *Rajah's* mother, was amongst the *Bundhoo* of the *Rajah*, and according to the *bewustas* of the *Pundits* of that Court, and those of the Zillah and Provincial Courts of *Poorneah*, *Tirhoot*, and *Azeemabad*, and the result of the examination of the *Mitacshara* and other *Pothees* venerated by the *Mitheelas*, in usage in the families of the parties in the cause, it appeared that the right of inheritance of the *Hungoturs* was prior to that of the *Bundhoos*." It was, therefore ordered, and a final decree was passed, deciding that the decree of the Provincial Court of *Moorshedabad*, passed on the 9th *December* 1809, should be affirmed, the Appeal dismissed, and that the Plaintiff should be liable to costs.

On the 3rd *April* 1819, *Gunga Dutt Iha* obtained

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leave to appeal from this decree to his Majesty in Council, subsequent to which, *Sree Narain Rae* died, leaving the present Respondents, his sons and representatives. *Mussumat Leelawattee*, the widow of *Lullit Narain Rae*, also died without issue, and *Gunga Dutt Iha*, the father of the present Appellants, having died, the Appellants as his heirs and representatives, obtained leave to revive and prosecute the appeal; and prayed that the several decrees appealed from might be reversed for the following reason:—

Because, according to the laws which regulate the succession to the property in dispute, *Gunga Dutt Iha*, the father of the Appellants, upon the death of the widow of the deceased *Rajah*, became entitled thereto, as the heir and representative of the *Rajah*.

The Respondents, however, submitted that the decrees appealed from ought to be affirmed for the following reasons:—

I. Because the parties being of a *Mitheela* family, and performing their ceremonies according to the *Mitheela Shasters*, the authorities clearly proved that *Sree Narain Rae* and *Lullit Narain Rae*, as the paternal kindred of *Rajah Indur Narain Rae*, were entitled to succeed to the *Zemindary* in question, and to all the *Rajah's* personal property, to the exclusion of the maternal relations.

II. Because the question being one entirely of *Hindu* law, could not be more fully or satisfactorily investigated than it had already been by the three Courts, the Zillah Court, the Provincial Court of *Moorshedabad*, and the Sudder Dewanny Adawlut, each of which, after elaborate investigation, decided in favour of the Respondents title.

Mr. *Wigram*, Q. C., and Mr. *E. J. Lloyd*, for the Appellants.

The question in this case is, whether the law of *Bengal* does not apply to property locally situated there; the *Pundits* are of opinion, that a person who derived his origin from a person of *Mitheela*, and lived in *Bengal*, did not lose his caste provided he continued the religious observations of the *Mitheela Shasters*. In ordinary cases the circumstances which determine questions with respect to real estate are the *situs* of the property, and with respect to personal property the domicile of the owner; as far as these principles extend, it is clear that the law of *Bengal* must apply, for it is no where denied that the property is not situated in *Bengal*; and that the intestate was domiciled in *Bengal* is also undisputed. By the authorities of the *Bengal* law there is no doubt the Appellants are entitled to succeed in preference to the Respondents, and even by some of the authorities of the *Mitheela* school, the Appellants title is preferable to the Respondents. If the decision is upheld, it will come to this: where you find a particular law is established in a country, a party coming into that country is entitled notwithstanding to import the particular law of his own tribe; the effect will be to decide that all private law may be introduced into *Bengal* proper. It is questionable whether there is any specific rule which enables the party to say he shall bring his own family law, and import it into *Bengal* proper. 1 *Strange's Hindu* Law, chap. vi. p. 125. 1 *Colebrooke's* Digest, p. 11. 2 *Colebrooke's* Digest, 2 vol. 501, sec. 9, 10, 24, 54, 55, 52, 64, 65, & 67. Sir *William Jones'* Institutes of *Hindu* Law, p. 211. *Harrington's*

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Analysis, Reg. I. 1793; Reg. IV. of 1793; 21 *Geo.* III. c. 70.

Mr. Serjeant *Spankie*, Sir Charles *Wetherall*, Q. C., and Mr. *J. Stuart*, for the Respondents.

Every civilized country allows an individual to make a Will to regulate the succession to his property, different from the general law of the land of his domicile; and the lenient toleration of the law of *Bengal* has been to allow the *Hindoos* to regulate their succession by their general and varying law as it exists in this country or that. The case of *Narain Chowdry* v. *Goculchund Goh*, promulged the law and made it known throughout *Bengal*, so that there cannot be now any doubt about the law: when it is ascertained that the party conforms to the customs of *Bengal*, the right of succession follows by that law; but if the conformity to the *Mitheela Shasters* continues, then the law of inheritance is governed by the law of *Mitheela*. The question then in this case is very clear; the *Rajah's* ancestors, unquestionably emigrated from *Mitheel* to *Bengal*, where they retained their *Mitheela* character by adhering to the religious ceremonies prescribed by the *Mitheela Shasters*. There is no analogy to the English law cited on the other side; it is not a question of *lex loci rei sitæ*, but of the law of the *Hindoos*, governed by their religious opinions; a question of caste, not of an individual. *Colebrooke's Hindu* Law Code, p. 257. The *Mitacshara* App. 53, ib.

Mr. Baron PARKE:—

In this case their Lordships concur in recommending

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ler Majesty to affirm the decision of the Court below. We would not have troubled the learned counsel for the Respondents, but that we were anxious the case should be fully investigated as it relates to property of a very large amount. On a full consideration, we feel no difficulty in assenting to the propriety of the decree of the Sudder Court on all points.

The Appellant claims the *Zemindary* of *Pergunna Haveelee Poorneah,* situate in the province of *Bengal.* He claims to be entitled as the cousin on the mothers side, and claims against the Defendant below, the father of the Respondents, who is related in the sixth degree on the fathers side. It is admitted that if the law on which the learned Judge Mr. *Harrington* proceeded, governs the succession, no valid objection can be taken to the decree of the Court below. That matter has been fully investigated; and although there was some doubt about it, the counsel for the Appellants do not feel strong enough to impeach the decree if it was rightly decided according to the law. Now was it so decided? Let us look in the first instance, to the point on which the parties put their case till they came to the Sudder Court. The Plaintiff does not state by what law his descent is to be regulated, but he claims as the heir at law of the deceased *Rajah.* The answer of the Defendants, whose representatives are the present Respondents, distinctly puts it on the ground that the *Shasters of Tirhoot* regulate the succession. They state that the case ought to be decided "according to the *Shasters* of *Tirhoot* which are in usage in the country, and particularly among the *Brahmins* of *Mitheela* who are ruled entirely thereby." Now when the Plaintiff comes to

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his replication it is equally clear that he puts his claim also on the *Shasters* of *Tirhoot* or the law of *Mitheela*, and there is not a word said about any other law to regulate the succession between the parties.

Then we find, that in pursuing his appeal to the Sudder Dewanny Adawlut, it is said that one small portion ought to be adjudged according to the law of *Bengal*. Now, is that right? Mr. *Harrington* who considered the question, is of opinion that the rule of succession ought to be the *Mitheela* law, according to which the parties have governed themselves, and he lays it down as a clear proposition of law, that in a case where a family migrates from one territory to another, if they preserve their ancient religious ceremonies, they also preserve the law of succession, and relies on the case of *Rajunder Narain Chowdry* v. *Goculchund Goh*, proceeding on the opinions of the *Pundits*, and which was in evidence in the Sudder Dewanny Adawlut. It is very true that the precise point decided by the Court in that case does not go to the full length of Mr. *Harrington's* judgment, for the family there had abandoned part of the religious observances and adopted those of *Bengal*; and there it is said that the law of that country must decide; there is a want of clearness, probably in consequence of the defect of translation; but the effect is, that if they had preserved their ancient religion, the law of succession would be according to the country from whence they migrated: that opinion is clearly adopted by the Court, and there is a note well deserving of attention which is not only the note of the Reporter, but as we learn, from the preface to the book, especially valuable as coming from the pen of Mr. *H. Colebrooke*.

Now the note upon this subject says, "If the family had been shown to have continued in the observance of the natural law and usages, namely, those of *Mitheela*, the rule of inheritance as established in that province must have been followed." They treat that as a matter of clear law and not admitting of any doubt. The present case, therefore, must be considered, rather as an exception to that which is laid down as the law in that case, because there they had abandoned those usages and taken to those of *Bengal*. It appears highly reasonable in such circumstances that that should be the rule, for the law of succession of the *Hindoos* partakes greatly of their religious opinions, and is part of their system.

It appears to their Lordships, that the opinion expressed by Mr. *Harrington* is the law to govern this case; and in respect to the application of that law to the state of this family, there appears no objection. Upon the whole view of the case, the law to decide, therefore, must be the *Mitheela* law; and according to that their Lordships cannot say that the case has been wrongly decided. It appears there was some little doubt as to the provision of the *Mitheela* law; the note to which I have referred, states that "the books of greatest authority in *Mitheela* on the subject of inheritance, are silent in regard to the sisters son; and the established opinion is, that the male descendant of the remote ancestor shall inherit, and not a descendant through females of a near ancestor." But that does not appear to have been perfectly decided; and therefore, probably this suit was brought to have that point cleared up, upon which the opinions of so many *Pundits* have been taken. It appears that the *Mitheela* law is against the claim of

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any relation on the mother's side till those on the father's side to the seventh degree have been exhausted. This being an appeal against the decision of the three Courts, it must of course be dismissed with costs.

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NATHOOBHOY RAMDASS - - - - - *Appellant*,

v.

MOOLJEE MADOWDASS, GOPALDASS MADOWDASS, and MUNMOHUNDASS DAVIDASS - - - - - - - - - *Respondents.**

On Appeal from the Supreme Court of Bombay.

7 February 1840.

THIS was a motion for the dismissal of an appeal lodged on the 19th of *November* 1838, under the following circumstances :—

On the 29th of *June* 1832, the Appellant and *Ramcooverboye* his mother, filed their bill of complaint on the Equity side of the Supreme Court of Judicature at *Bombay*, against *Madowdass Kunsordass* and *Davidass Hurjuvandass*, stating (amongst other things) that *Ramdass Manordass*, formerly a merchant and *Hindu* inhabitant of *Bombay*, on or about the 17th of *February* 1808, departed this life, having duly made his Will, whereof he appointed the Defendants *Madowdass Kunsordass*, and *Davidass Hurjuvandass* executors ; to whom Probate was granted by the Recorder's Court on the 29th of *March* 1813 ; and thereby after other

The right of appeal given by the charters of *Bengal*, *Madras*, and *Bombay*, is not confined to cases where a right or duty is finally decided, but includes interlocutory judgments, decrees or decretal orders ; such appeal does not, however, extend to the finding of a jury upon issues directed from the Equity side of the Court ; no motion for a new trial having been made, nor exceptions taken to the Master's report founded on the verdicts in such issues.

Semble.—The word "*determination*" in the charter of *Madras* and *Bombay* is equivalent to the "decree or decretal order" of the *Bengal* charter.

* Present : Members of the *Judicial Committee*,—Mr. Baron Parke, Mr. Justice Bosanquet, Mr. Justice Erskine, and Sir Stephen Lushington.

Privy Councillor,—*Assessor*, Sir Edward Hyde East, Bart.

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bequests he gave and bequeathed the residue of his property estate and effects to his widow *Ramcooverboye*, and his two sons, the Appellant *Nathoobhoy Ramdass* and *Wittuldass*: and after stating that a certain partnership had formerly existed between the testator and the Defendant *Davidass*, but that the same had been finally closed and determined, and mutual releases executed by both parties in 1808, previous to the testators decease, the bill prayed that the Will might be duly established, and that the usual account of the real and personal estate might be taken, and the same applied in due course of administration.

The Defendants severally put in their answers; the Defendant, *Davidass Hurjuvandass*, insisted on the partnership between the testator and himself subsisting at the time of his decease, and denied the execution of any release, as stated by the Plaintiffs; but insisted that the accounts had never been wound up, and he claimed to retain such part of the residue as remained in his hands for the liquidation of the balance due to him on account of such partnership.

Upon the hearing of the cause, on the 1st of *March* 1834, two issues were directed by the Court, with a view of determining the existence of the partnership, and the alleged release. These issues were afterwards tried before the Supreme Court, on the Plea side, and verdicts found for the Defendants; viz., on the first issue, that a partnership did exist between him and the testator, and on the second, that such partnership was determined on the 29th of *January* 1808.

On the 19th of *November* 1835, the Appellant, *Nathoobhoy Ramdass*, applied by motion, on the Plea side of the Court, for leave to appeal to the King in Council from the above verdicts; but the Court having

taken time to consider his application, on the 29th of *February* 1836, refused the motion.

No application was made for a new trial by the Appellant; but the suit having abated by the death of the Defendant, *Davidass Hurjuvandass*, and been duly revived against his widow *Mooleevahoo* and the Respondent *Munmohundass*, his personal representatives, the Appellant, on the 29th of *August* 1836, moved the Court on the plea side for leave to appeal against the above mentioned verdicts or judgments given upon the issues, and on the 2nd of *September* following an order was made, that the petition of appeal be filed, on its being amended, by striking out such part as related to proceedings not on record on the Plea side of the Court, as forming a part of the proceedings on the trial of the issues, and on payment of the costs of opposition of the motion: and it was ordered, that the Appellant should give good and sufficient security for the payment of all such costs as might be incurred by the appeal, in the event of his failing therein; and for the performance of such judgment or order, as His Majesty might think fit to give or make thereon; and upon such security being given, the Court allowed the appeal, and directed true copies of the issues, evidence, verdicts, or judgments, and orders should be certified under the seal of the Court.

On the 26th of *October* 1836, the petition of the Appellants for liberty to appeal against the above verdicts or judgments was filed; but no security was at that time given, in conformity with the liberty to appeal.

On the 11th of *November* following, a motion was made to dismiss the above order for allowing the appeal, which was refused, though without costs.

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On the 19th of *November* 1836, the original cause came on to be heard, on the Equity side of the Court, on the finding, upon the aforesaid issues, and for further directions; and by the decree then made, certain accounts respecting the partnership formerly existing between the testator and *Davidass* were directed to be taken, and further directions reserved.

On the 8th of *February* 1837, the Appellant applied, on the Equity side of the Court, for liberty to appeal to His Majesty in Council against the above decree of the 19th of *November* 1836, which was on the 28th of the same month allowed, on the petition of appeal being amended, by mention being made therein of the allowance by the Court, on the Plea side thereof, of an appeal to His Majesty in Council from the verdicts or judgments given by the Court on the trials of the issues.

On the 22nd of *November* 1837, the Appellant filed his security bond, on the Plea side of the Court, and on the 8th of *December* he filed his general petition of appeal against the decree of the 19th of *November* 1836.

On the 12th of *February* 1838, the Respondent, *Munmohundass Davidass* applied, by motion, and obtained an order *nisi* on the Plea side of the Court, that the order of the 2nd of *September* 1836, and the petition for leave to appeal from the verdicts or judgments, filed on the 26th of *October* 1836, and the subsequent petition of appeal, of the 8th of *December* 1837, should stand dismissed.

The motion was supported by a certificate of the proceedings had in the cause, given by the Prothonotary of the Court, by which the various steps above set forth were detailed, and from which it appeared

that no proceedings had taken place in the cause subsequent to the filing of the security bond and the general petition of appeal, nor any copies of the evidence given on the trial of the issues transmitted, under the seal of the Court, to His Majesty in Council.

On the 23rd of *February* cause was shown against the above order *nisi*, when the same was made absolute.

On the 19th of *November* 1838, the Appellant lodged his petition of appeal in the office of the Privy Council, which was entitled in these causes on the Equity side of the Supreme Court; and after stating the leave given to him, on the 2nd of *September* 1836, to appeal from the judgments or verdicts, and also the order of the 28th of *February* 1837, giving him leave to appeal from the decree of the 19th of *November* 1836, the petition prayed, that His Majesty in Council would review and rehear the cause, and thereupon reverse, vary, or alter the judgments of the Supreme Court on the issues and the decree of the 19th of *November* 1836.

The Respondent *Munmohundass Davidass*, appeared to this appeal, but no proceedings having been taken under it, he on the 8th of *November* 1839, presented a petition to Her Majesty in Council, in which, after stating the circumstances above detailed, and insisting that the appeal and petition of the 19th of *November* 1838, was irregular, and that the orders of the 2nd of *September* 1836, and the petitions of the 26th of *October* 1836, and 8th of *December* 1837, were severally discharged by the order of the 23rd of *February* 1838, he prayed that the petition of appeal of 19th *November* 1838, might be taken off the file or dismissed with costs, or that so much of the petition and appeal as prayed to reverse, vary, or alter

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the judgments of the Supreme Court on the issues, might be dismissed or discharged with costs.

Mr. *Wigram*, Q. C., and Mr. *E. J. Lloyd*,

Moved to dismiss the appeal, as having been improperly presented, after the order allowing the same had been dismissed by the Court. They insisted also that the order of the 23rd of *February* 1838, applied to the proceedings both on the Plea side and on the Equity side of the Court;—that the Appellant ought, if he disputed that order, to have made a special application to the Court below, and that he was, in fact, now endeavouring to prosecute an appeal against a judgment obtained on the Plea side by means of proceedings taken on the Equity side of the Supreme Court. They contended, also, that the Appellant had miscarried in his mode of proceeding,—that no appeal could be made from the finding of the Court on the issues in question but by means of a new trial, or exceptions taken to the Master's Report,—that the case was not one within the meaning of the Charter of Justice, and that he was utterly precluded, by the order of the 23rd of *February*, from prosecuting an appeal either against the verdicts or the decree in question.

Mr. *Pemberton*, Q. C., and Mr. *A. Lewis*,

Contended that the trial of issues by the Judges of the Supreme Court, instead of a jury, brought the findings or judgments of the verdicts within the intent and meaning of the Charter of Justice;—that the filing the petition of appeal, and executing security for the due prosecution thereof, were matters subsequent

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to the allowance of such appeal, not required by the Charter, as a condition precedent to the granting of the appeal; and that the Court, having once made the order allowing such appeal, had no further jurisdiction in the matter; they insisted that the issues in question were *coram non judice* at the period the order *nisi*, of the 12th of *February* 1838, was made absolute, and could not be held binding on the Appellant, who having perfected his security, and presented his petition in the Court below, before lodging his case here, had substantially complied with the conditions imposed on him by the Supreme Court, and could not be precluded from prosecuting the appeal so presented. They cited *Chowdry* v. *Mullick*, 1 *Moore's* Indian Appeals, 358.

Mr. Baron PARKE:—

11 February.

In this case a motion was made on the part of the Respondent to dismiss the appeal, so far as it was an appeal from the decision of the Supreme Court of *Bombay* on its common law side, in the nature of a verdict on an issue directed on the equity side of that court in this suit, it being admitted that the appeal was competent so far as it related to the equity suit.

The suit was instituted by the Appellants to recover their shares, as the residuary legatees of the estate of a *Hindoo* testator, whose executors are represented by the Respondents. The answer of one of the executors set up a case of partnership between the testator and himself, and a right to retain the amount of the balance due from the testator. The court ultimately directed two issues to be tried on the common law side of the courts, one whether there was such a partnership, and the other whether it had been put an end to. The court

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on the common law side, on the trial of the first issue, decided that there was a partnership.

There was no motion for a new trial, but the court on the common law side gave leave to appeal on the 2nd of *September* 1836, on giving security, without mentioning the time for it. The petition for leave to appeal was filed on the 22nd of *October* 1836, but the security was not given until the 22nd of *November* 1837.

On the 19th of *November* 1836, the cause came on for further directions founded on the issues, and a decree was made referring it to the Master to take the usual accounts.

On the 28th of *February* 1837, leave was given to appeal from this decree, on condition of the amending of the petition of appeal, and stating that leave had been given on the common law side to appeal against the finding on the issues.

On the 12th of *February* 1838, an order *nisi* was obtained to discharge the order for leave to appeal against the finding on the issues, and on the 23rd of the same month, the court made that order absolute, and the leave to appeal was rescinded, but on what ground does not appear.

Notwithstanding the order for leave to appeal, of the 2nd of *September* 1836, was so rescinded, the appeal was lodged in the Privy Council against the finding on the issues, as well as the decree on the equity side, of the 19th of *November* 1838, and it is contended that so far as relates to the findings, it is not competent for the Appellant to prosecute his appeal; under these circumstances, several objections were taken and argued, which the court will now dispose of, having taken time for consideration on account of the practical importance of some of them.

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One objection was that under the Charter of Justice of *Bombay*, it is not competent to appeal against any determination which is not of a final character, which does not settle some right or impose some duty. The Charter of Justice of *Bombay* is, as near as may be, a transcript of that of *Madras*, of the 33rd *Geo.* III. The Charter of *Madras* follows that of *Bengal*, of the 13th *Geo.* III., with this difference, that liberty is given to appeal against any *Judgment* or *Determination* of the Supreme Court of *Madras*, whereas, the liberty to appeal is given in the *Calcutta* Charter against any "Judgment, decree, order, or rule," afterwards varying the terms to "Judgment," "Decree," or "Decretal order." In other respects the provisions in each are substantially the same, and we are all of opinion that the word "determination" is an expression at least equivalent to the terms used in the *Bengal* Charter; and as an appeal undoubtedly lies from all Decrees or Decretal orders in the equity side of the Supreme Court at *Calcutta*, it does equally from every decree or decretal order on the equity side of the Supreme Court of *Bombay* and *Madras*.

The context of all the three charters shows that the appeal is not *confined* to cases in which some right or duty is finally decided; and the clause limiting the value in dispute to ten thousand *Pagodas* does not apply to the value of the matter in dispute involved in the order, but to the subject of the suit itself.

But then it is said that this finding of the court on its common law side, in the nature of a verdict, is a "*determination*" which may be directly appealed from. Undoubtedly such a verdict in a common law suit, might be indirectly appealed from, in an appeal against the judgment in that suit, which is founded on that

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verdict, the evidence, as well as the finding, being brought up as part of the proceedings, and included in the transcript. But the verdict only, prior to judgment being given, could not be appealed from in a common law suit; nor can this verdict on an issue directed from the equity side, as a *determination* in a common law suit.

There is indeed no common law suit. In trying the issue, the Court of law is merely ancillary to the Equity Court: it investigates facts, and pronounces its opinion on them, merely in order to ground some further proceedings in the equity suit: the verdict itself is no proceeding in the equity suit, it only becomes so when it is adopted and acted upon in that suit. It stands on the same footing as the finding of a jury in a distinct common law court, analogous to the case of a reference to the Master, which when confirmed by the Court, and not before, is the subject of appeal. If a party objects to such a report, he must except to it, and the overruling that objection and conforming the report, opens the whole question of the propriety of the finding of the facts contained in it, to the review of the Court above; but if there be no exception, the report is not open to such revision. In the present case, the Appellant meaning to object to the finding of the Court on the facts, should have applied to the equity side for a new trial, as a verdict against evidence; and having brought all the evidence before the Court, the refusal of a new trial and consequent adoption of the finding, as one of the grounds for a decree, would then have been the subject of appeal; and the propriety of the decision on the facts would be considered and decided in a Court of Appeal. But as the Appellant did not pursue that course, he must be taken to have made no objection to

the finding, and the verdict on the issue of which the *postea* is the only evidence, is to be treated as one proof of the truth of the facts in the cause involved in it, and may be acted upon accordingly. I say as *one* proof—not a conclusive proof, because it might happen that in opinion of the Court of Appeal, the evidence in the cause was so strong that no finding of a jury, or the finding of the Court below itself ought to weigh against it.

As there has been no application for a new trial in this case, the facts proved on the issues, and the propriety of the finding upon it, cannot now be brought under our review—and the appeal must be confined to the propriety of the decree on further directions, founded on the *postea*, and the evidence in the cause.

In the case of *Chowdry* v. *Mullick*, the question was disposed of, upon a different point.

Another objection taken by Mr. *Wigram* would also in our opinion be fatal: *viz.*, that the leave to appeal granted at the common law side, has been vacated, by order on the common law side of the Court—and if an appeal could be against an order on the common law side, it ought to have been made against the last order which stands good until vacated. At all events, therefore, there is *now* no liberty to appeal against the finding on the issues, and so much of this appeal therefore as seeks to vary or alter the judgments of the Supreme Court on the issues must be dismissed.

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KINDER, PRINTER,

GREEN ARBOUR COURT, OLD BAILEY.

CASES IN THE PRIVY COUNCIL

ON APPEAL FROM THE EAST INDIES.

RAJUNDER NARAIN RAE, and COWER MOHAINDER NARAIN RAE, (the two surviving sons and representatives of RAJAH SREE NARAIN RAE) - - } *Appellants,*

v.

BIJAI GOVIND SING, (son and representative of BHYA JHA, deceased) } *Respondent.**

On Appeal from the Sudder Dewanny Adawlut of Bengal.†

13, 14, 15, 16, & 20 Dec. 1839.

IN this case there were three appeals between the same parties. The first respected the validity of a deed of compromise entered into by parties having adverse

A *soluhnamah* or deed of agreement to compromise conflicting claims entered into in the presence of witnesses and solemnly acknowledged in Court, by parties who were mutually ignorant of their respective legal rights, cannot afterwards be set aside upon plea of ignorance of the real facts, when the party seeking to avoid the deed had the means of ascertaining those facts within his reach.

Gross fraud and imposition are not to be imputed upon mere suspicion, and unless the charge is proved, a party cannot be released from an agreement entered into by their own solemn act.

The *onus* of showing that a compromise has been fraudulently obtained by intimidation and false representation, is cast upon those who seek to impeach the validity of their own deed.

By the common law this Court possesses the same power as the Courts of Record and Statute have, of rectifying mistakes which have crept in by misprision or otherwise, in embodying its judgments.

Where, therefore, an order had been made *exparte*, upon the appearance of the respondents alone, for the dismissal of an appeal and affirmance of the judgment of the Court below, which purported to be upon the hearing of the cause, the Judicial Committee held that such order must be held simply as a dismissal; and it appearing that the appellants were infants, under the protection of the Court of Wards in *India*, and that the agent

* Present: Members of the *Judicial Committee*,—Mr. Baron Parke, Mr. Justice Bosanquet, the Chief Judge of the Court of Bankruptcy, and the Right Hon. Dr. Lushington.

Privy Councillor,—*Assessor*, Sir Edward Hyde East, Bart.

† Reported 2 Macnagh. Sud. Reps. 23.

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claims for the property in question. The second, which was incidental, arose from the judgment below being affirmed upon the non-prosecution of the appeal; and the third involved the mode of taking the rests in an account upon which interest was decreed to be paid at the rate of one per cent. per mensem. A claim to the same property had been the subject of a previous appeal.*

Rajah Inder Narain Rae was at the time of his death absolutely entitled for an estate of inheritance to the zemindary of *Pergunnah Havila Poorneah*, and was also possessed of personal property consisting of jewels and other effects of great value; he died in the year 1784, without issue, leaving his widow, *Ranee Indrawuttee* surviving.

Upon his death, the *Ranee* (who was herself possessed of real and personal estate, which she had enjoyed separately during the *Rajah's* life) took possession, according to the Hindoo law, of the *Zemindary* and other property belonging to the late *Rajah*, both real and personal, and continued in possession during her life.

On the 15th of *November* 1803, the *Ranee* died, having, as it was alleged, about six hours previous to her death, adopted *Bhya Jha*, the son of her uncle, *Roodsohut Jha*, and the father of the Respondent, *Bijai Govind Sing*, as her *Khurta Pootra*, or adopted son, and appointed him sole heir to her real and personal estate.

* *Ante*, page 132.

appointed by the Court to act as their guardian *ad litem*, in the matter of the appeal, had absconded, and abandoned the cause, their Lordships rescinded the order of dismissal, and restored the appeal on the terms of the appellants paying the costs and giving access to the transcript of the proceedings in the Court below, in their hands, and undertaking to lodge cases within five months.

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By virtue of such adoption or appointment, and pursuant to the established law and custom of the country, *Bhya Jha* performed the *Sraddh* or funeral rites over her corpse, and the other ceremonies required from her constituted legal heir; but the *Nazir* of the Zillah Court of *Poorneah*, not being aware of the fact of the adoption, or not crediting it, on the day of her death reported to the Zillah Court that the *Ranee* had died intestate, that there were none but her servants to take charge of her property and estate, and that it was unknown who was her heir or successor; and expressed his fears that unless measures were taken to protect the moveable property, it would be embezzled and made away with.

In consequence of this report, the Judge of that Court, on the same day, ordered possession of the *Ranee's* dwelling places to be taken by the *Darogah* of Police, for the purpose of protecting her property.

On the 16th of *November* 1803, proclamation was made by the Zillah Judge announcing the attachment of the property belonging to the *Ranee*, and requiring those who claimed to be entitled to inherit the property of which the *Ranee* was in possession at her death, to appear and state their claims.

In pursuance of this proclamation, petitions were presented by *Sree Narain Rae* (the father of the present Appellants), *Lullit Narain Rae*, his brother, and *Ram Narain Rae*, a nephew, stating their descent with the *Rajah* from a common ancestor, and claiming the property of the deceased *Ranee*, of which they prayed to be put in possession.

Bhya Jha also filed his claim as the *Khurta Pootra*, or adopted son of the *Ranee*.

Pending these petitions, and before any orders were

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made thereon by the Court, *Sree Narain Rae*, *Lullit Narain Rae*, *Ram Narain Rae*, and *Bhya Jha* agreed to compromise their claims, and for that purpose executed a *Soluhnamah*, or deed of compromise, bearing date the 11th of *December* 1803, which was in the terms following:—

"We, *Sree Narain Rae*, and *Lullit Narain Rae*, " sons, and *Ram Narain Rae*, grandson of the late " *Rajah Chunder Narain Rae*, *Zemindars* of the *Pergun-* " *nahs Kudooah*; Whereas *Ranee Indrawutte*, *Zemindar* " of *Pergunnahs Havila Poorneah*, having after a short " illness died on the 1st of *Aughun* 1211, *Moolkie*, " being *Tuesday*, and in consequence of her having no " son, having on that same day, being of a sound mind, " and being in full possession of her faculties, con- " stituted *Bhya Jha*, her maternal first cousin (mother's " brother's son), her *Khurta Pootra* and proprietor " *(Malik)* of her *Zemindary*, &c., and the said *Bhya* " *Jha*, after performing the *Sraddh* of the said *Ranee*, " having presented petitions to the Judge and Col- " lector, praying to be permitted to assume the " management of the said *Zemindary*, and to possess " himself of the whole *Zemindary* and property, move- " able and immoveable, to the exclusion of all other " persons, in like manner as they were possessed by " the said *Ranee*; but whereas we are descended from " the same common stock with the late *Rajah Inder* " *Narain*, the husband of the late *Ranee*, by seven and " eight removes, and are thus entitled, and *Bhya Jha* " is also entitled in virtue of the *Khurta Pootra*, as " well as from his near relationship; and whereas " the contest for so great a *Zemindary* from the Zillah " to the Presidency, nay even to *England*, would re- " quire the age of *Noah* to be passed in seeking jus-

" tice, and in anxiety and care, and make us waste " our existence, and after all be like the dispute of " *Ummur* and *Zaid* ; considering these things, and " considering, moreover, that life is unstable and pre- " carious, and that nothing that this world can give " is worth kindling discord among us and deceiving " ourselves for the encouragement of incendiaries, and " to gratify the malice of the envious, and that from " such contest nothing could result but reproach and " dishonour to our illustrious family, which our prede- " cessors in this great *Rajah* having deemed unworthy, " and from the beginning of the *Rajah* to the time " present, such domestic disputes have never happened, " and life is but a few days, and enmity between rela- " tions is esteemed by men of elevated rank the worst " of all things, therefore we and *Bhya Jha*, the said " *Khurta Pootra*, who is a person having right, and " not a stranger calling to mind the name of *Bhugwan*, " than which there is nothing more precarious either in " this world or in eternity, have mutually pledged our " faith and truth, and by firm agreement and fearful " oaths entering into peace and concord, declaring and " meaning both of us, the same have agreed to become " satisfied with equal shares of the whole of the pro- " perty, moveable and immoveable, composing the " estate left by the late *Ranee*, and consisting of cash, " goods, *Pergunnahs*, both of the former *Zemindary* " and the *Zemindary* recently acquired by private and " public sale, revenue and rent free debts, *Nankur* " credits, mercantile concerns, &c. ; that is to say, the " said *Bhya Jha* shall hold the right and property of " one half the said *Zemindary*, &c., and we the other " half, whatever profits shall be forthcoming from the " *Malguzary* after discharging the revenue of Govern-

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" ment from the *Zemindary* right, &c. We will at " the end of the year account for to each, that is to " say the profits of eight *Anas*, or one half of the " *Zemindary*, shall be our right, and the profits of the " other half *Bhya Jha's*, and we shall have no claim " thereunto. If, which God forbid, the public revenue " should fail, both parties, to wit, We, the three per- " sons aforesaid, and *Bhya Jha*, will personally make " good the loss, and after our own names and *Bhya* " *Jha's* shall be made current in the *Zemindary*, and " we shall have obtained a *Perwanna* and *Sunnud* " from the ruler for the time being, and shall have " secured the revenue for 1211 *Moolki*, if such be the " will of both parties, We the said three persons, and " *Bhya Jha*, making a partition between us, will take " eight *Anas* of the whole property, moveable and " immoveable, &c., being his share. Designing, there- " fore, to enter into given engagements, we have of " our own free will and consent, and on our own faith " and truth, granted this writing as an agreement and " declaration, the intent of which is to establish firm " records between the parties to terminate our differ- " ences, and to perpetuate the illustrious name of the " deceased *Ranee*, so that it may be a valid document " for the future, and prevent any fraud or deceit on " either side ; and that as we have no longer any " claims against *Bhya Jha*, should we prefer any claim " of right or inheritance according to the *Shiruh*, or " in the *Adawlut* of the *Hakim*, it may be deemed " incapable of being entertained or heard with a view " to proof ; and should we violate this agreement, or " in any other way, either of ourselves, or at the sug- " gestion of others, and attempt by colour or pretext " to establish any fraudulent objections against it,

" we shall merit hell and to be deemed bastards and " outcasts of our race. We have accordingly granted " this Declaration, as a valid document of partition, to " serve when needed. Dated the 27th of *Aughun*, " *Moolki* 1211, or 11th of *December* 1803."

A counterpart Deed was executed by *Bhya Jha*, in favour of *Sree Narain Rae*, *Lullit Narain Rae*, and *Ram Narain Rae*, of which the following is a copy :—

" I, *Bhya Jha*, cousin of the late *Ranee Indrawuttee*, " am become *Zemindar* of the *Havila*, *Pergunnahs* " *Poorneah*, &c. When the *Ranee* was in her perfect " senses, and collected in her mind, she appointed me " her adopted son, to succeed to the whole of her pro- " perty and estate ; and, after a short illness, expired " on the 1st *Aughun* 1211, B. S. ; upon which I, " according to the *Shaster*, performed the funeral " rites, informed the Judge and Collector of all the " circumstances, and prayed to be put in sole pos- " session of the *Malguzary* lands.

" In the meantime, *Sree Narain Rae* and *Lullit* " *Narain Rae*, sons of *Rajah Chunder Narain Rae* " deceased, *Zemindar* of *Pergunnah Koodooah*, and " *Ram Narain Rae*, son of *Deo Narain Rae* deceased, " who was the eldest son of *Rajah Chunder Narain* " *Rae* deceased, are the seventh and eighth lineal " descendants from *Rajah Inder Narain* deceased, " husband of the *Ranee*, and collateral grandson with " *Ram Chunder Narain Rae*, of one grandfather ; and " *Ram Narain Rae*, set forth to the Judge and Col- " lector their claims, as heirs at law ; from which it " appearing that there must be many appeals to the " several Courts for adjusting the claims on this " immense estate, that one ought to be immortal, for " it can never end during our lifetime ; and in observ-

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" ing this, and that life is precarious and uncertain, " why should we quarrel? We cannot benefit; it " must fall to the lot of others; it will only bring dis- " grace upon our ancient house, which our forefathers " would disapprove, and which has never yet fallen " upon our illustrious family: it is also highly im- " proper for good men to quarrel; God, therefore, " being my witness, at the consent of both parties, *i. e.* " *Sree Narain Rae, Lullit Narain Rae*, and *Ram Na-* " *rain Rae* and myself, an *Ikrarnamah* hath been entered " into, firm and binding as being positively sworn to, " advising that the whole of the moveable and im- " moveable property of the late *Ranee*, *i. e.* money " and effects, lands formerly belonging to the estate, " and lands lately purchased, lands in whatever way " purchased (*i. e.* by public or private sale), *Rarajee* " *Lakhiraj* lands, *Nankar* lands, *Luknee* (or debts due " to the estate), *Tujanet* (or commercial property), " should be divided half and half; and that after pay- " ing the revenues to Government, and receiving the " rights of the *Zemindary*, and observing the accounts " of the house and other expenditure, whatever may " remain should be divided between the parties; *i. e.* " the produce eight *anas*, or one-half of the *Zemin-* " *dary*, &c. &c. &c. becomes my share, and the other " half devolves upon the three brothers, *i. e. Sree* " *Narain Rae, Lullit Narain Rae*, and *Ram Narain* " *Rae*. That in case losses should fall upon the *Mal-* " *guzary* lands, they are to be repaid by each paying " according to their shares. That after affixing each " party their signatures, and receiving a *Perwanna* " and *Sunnud* from the Judge, and the revenues paid " to Government for the year 1211, B. S., that, if I " should then wish the distribution to take place, I

" should be enabled to receive my share as above " stated, and the brothers theirs in the like manner.

" Having written this in the form of an *Ukudnamah*, " in perfect peace, from promise and upon oath that " if I or they act contrary to what has been written, or " deny the above, or are in any way deceitful, we will " certainly depart to the infernal regions,—I, there- " fore, have written the above in the form of a bond " of *Hissanumuh*, which, when required, may appear " against me."

Petitions were presented by all the parties for the confirmation of these Deeds of compromise, the validity of which, as well as the claims stated therein, were mutually admitted in open Court by *Sree Narain Rae*, *Lullit Narain Rae*, and *Bhya Jha*; but some dispute having arisen between them and *Ram Narain Rae*, who complained that though made a party to the Deed of Compromise, he was excluded in the proceedings before the Court, the Court entered upon an examination of the validity of the claims made by the several petitioners, and on the 30th of *December* 1803, declared that the *Soluhnamahs* were collusively executed, and could not be admitted as valid, having been entered into three days after the *Ranee's* decease, while the property, which was of considerable amount, was under attachment, and before the rightful heirs were ascertained, the parties being in ignorance of their own rights, and seeking only to divide the property, without any proof of title, when there were other parties claiming to be relatives of the late *Ranee*; and that *Sree Narain Rae* and *Lullit Narain Rae*, having proved themselves the heirs at law of the late *Rajah*, should, on giving security, be put in possession of the *Zemin-*

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dary, and that *Bhya Jha* should be left to prosecute his claim in a regular suit.

The heirs at law being thus put in possession of the *Rajah's* estates, *Bhya Jha* still preferred his claim to the estate of the *Ranee*. The Judge of Zillah *Poorneah* therefore, on the 10th of *January* 1804, stated the following case for the opinion of the *Pundit* of the Court:—"It having appeared that the *Ranee*, after the "death of her husband, the *Rajah*, succeeded to his "entire property, moveable and immoveable, and that "during the time they were in her possession she pur- "chased other *Zemindaries* with the profits arising "from the landed property, and that considerable "sums in cash had been accumulated from the profits "of the *Malikana*, in addition to what was left by the "*Rajah*, all of which she left behind at her death; "and a *Bewusta* given by the *Pundit*, having declared "*Sree Narain Rae* and *Lullit Narain Rae* entitled to "the whole as kinsmen in the seventh degree of affi- "nity to the *Rajah*,—therefore they have both of "them been now put in possession of the immoveable "property, and the moveable effects are still under "the seal of the Court. *Bhya Jha* preferred claims "as *Khurta Pootra* to the *Ranee*, and alleged himself "to stand in the relationship of maternal cousin to her, "but his statement respecting his being the *Khurta* "*Pootra*, being liable to suspicion, an order has been "already passed for *Bhya Jha* to establish his claims "by a regular suit; but before putting *Sree Narain Rae* "and *Lullit Narain Rae* in possession of the moveable "property left by the *Ranee*, the following question "was put to the *Pundit*, for the information of the "Court. 'In case it should be proved that *Bhya Jha*

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" ' is a maternal cousin of the *Ranee*, is he, according " ' to the *Shasters*, entitled to the moveable property " ' vacated by her death ?' "

The answer of the *Pundit* was, " That *Bhya Jha* " being related in the female line to the *Ranee*, who " succeeded to the whole of her husband's property " after his death, he cannot succeed to the aforemen- " tioned property, for there is no authority given by " *Menu*, for any descendant in the female line to suc- " ceed to property, but *Sree Narain* and *Lullit Narain*, " who are related in the seventh degree, can succeed " to it."

Although it appeared after a perusal of this *Bewusta* that *Sree Narain Rae* and *Lullit Narain Rae* were the legal heirs to the moveable property of the *Ranee*, yet before giving them possession, it appeared advisable for the Court, according to section 2, Regulation V, of 1799, to send a copy of the proceedings held on the 10th of *January* 1804, with a copy of the *Bewusta* of the *Pundit*, to the Sudder Dewanny Court, that the proceedings and *Bewusta*, might be laid before the *Pundits* of that Court.

On the 4th of *February* 1804, the *Bewusta* of the Sudder *Pundits* was forwarded to the Zillah Court. The question proposed to them, on the same statement as that laid before the Zillah *Pundit*, was as follows :—

" In case it should be proved that *Bhya Jha* is a " maternal cousin of the *Ranee*, is he according to the " *Shasters* entitled to the moveable property vacated " by her death ?"

The opinion of the *Pundits* was in these terms :—

" Having considered what is above written, and " reflected on the question proposed, we give our " opinions. The *Ranee Indrawuttee*, after her husband's

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"death, was heir to his property moveable and immoveable, and from the profits of the landed estate, "she purchased other *Zemindaries*. After her death "*Bhya Jha*, in consequence of the relationship as "maternal cousin, cannot succeed to any of the property, moveable or immoveable, vacated by the husband, which devolved to his widow, neither do any "of the profits which might have accrued from it "become the property of the cousin, according to any "*Shaster*, but *Sree Narain Rae* and *Lullit Narain Rae*, "who are related in the seventh degree to *Rajah Inder* "*Narain Rae*, husband of the *Ranee*, are the heirs. In "support of this *Bewusta*, it is written in the *Daya* "*Bhaga*, and *Dae Tannoo*, and in the *Bibad i Bhukarun* "and *Buchun i Kantain Moon*, Let the woman who is "without children, for the sake of her virtue, remain "with her father-in-law, and as long as she lives, "apply her husband's fortune to charitable acts, "and after death it devolves to her husband's "heirs."

Upon receiving this answer, the Zillah Court was of opinion that *Bhya Jha*, as maternal cousin, *i. e.*, the son of the *Ranee's* mother's brother, had no claim whatever, according to the *Shaster*, to the property vacated by her, but *Sree Narain Rae* and *Lullit Narain Rae*, who were related within seven degrees to the *Rajah Inder Narain Rae*, husband of the late *Ranee*, were according to the *Shaster* entitled to the property moveable and immoveable left by her. The *Bewusta* given by the *Pundits* of the Zillah Court, and by those of the Sudder Court appearing, on comparison, to agree, an order was pronounced by the Zillah Court on the 11th of *February* 1804, as follows:—

"That *Raja Sree Narain Rae*, and *Lullit Narain*

" *Rae* do take possession of such moveable property " left by the *Ranee*, as may be under the seal of the " Court, and that a *Perwanna* giving them possession " be issued."

On the 13th *February* 1804, *Perwannas* were addressed, giving possession of the moveable property at *Mohunnee* and at *Pusserah*, to *Sree Narain Rae* and *Lullit Narain Rae*.

After various petitions and proceedings, both on the part of *Bhya Jha*, *Sree Narain Rae* and *Lullit Narain Rae*, a final order was passed by the Sudder Court, whereby it was ordered that *Bhya Jha*, " whether he " claimed the whole property of the *Ranee*, in conse- " quence of his having been adopted by her, or whether " he laid claim to the half of it only according to the " agreement contained in the *Soluhnamah*, with *Sree* " *Narain Rae*, and others, should institute a suit for " that purpose in the Dewanny Court of Zillah *Poor-* " *neah*, in conformity to the Regulations."

In pursuance of this order *Bhya Jha* on the 17th of *June* 1805, filed a plaint *in formâ pauperis* in the Zillah Court, against *Sree Narain Rae* and *Lullit Narain Rae*, alleging and insisting on his adoption by the *Ranee*, and setting forth the circumstances attending the execution of the *Soluhnamah*, and after stating that though he was ready and desirous of carrying the conditions of that deed into effect, the Defendants refused to concur with him; he claimed the entire estate as *Khurta Pootra*, by virtue of his adoption.

To this petition of complaint, *Sree Narain Rae* and *Lullit Narain Rae* put in their answer, denying that *Bhya Jha* had been constituted *Khurta Pootra*, by the deceased *Ranee*, and contending that even if he had, the

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Ranee was not authorized by the *Shasters* to dispose of the property in question.

On the 20th of *May* 1806 *Bhya Jha* filed his replication, in which, after putting at issue the Defendant's statement, he submitted that proof of his adoption as *Khurta Pootra* was unnecessary inasmuch as the Defendants had admitted his title as such, upon the occasion of their acknowledgment of the *Soluhnamah* in open Court.

The Plaintiff filed no rejoinder, but, on the 26th of *June* 1809, *Bhya Jha* put in a supplemental petition, setting forth his claims to the moveable and immoveable property, left by the *Ranee*, first as *Khurta Pootra* for the whole estate real and personal, amounting to S. R. 1,135,693; secondly, on the deed of compromise for a moiety of that sum, and that when the cause should come on for trial, he, *Bhya Jha*, would bring forward or rely on either of these counts as he might think proper.

The Provincial Court of *Moorshedabad* pronounced, on the 28th of *July* 1809, their decision in the cause, and after going over and examining the various circumstances and proceedings already detailed, and the *Soluhnamahs*, stated that it appeared unnecessary to the Court to enter into any further consideration of the claims of either party, whether *Sree Narain Rae* and *Lullit Narain Rae*, were or were not the rightful heirs of the *Ranee*, and *Bhya Jha*, whether he was or was not *Khurta Pootra*, they were equally bound by the stipulations of the engagement mutually interchanged, and the *Soluhnamah* executed before the acting Judge, defined the rights of either party. It was therefore but just that the Defendants, who were in possession of the whole zemindary of the late *Ranee*, should make

over half of it to the Plaintiff *Bhya Jha*; and the said *Bhya Jha*, under the present terms of the agreement, was entitled to one half of the estate, property, and effects of the *Ranee*, and also to a moiety of the profits of the *Zemindary* since the time that *Sree Narain Rae* and *Lullit Narain Rae* had possession.

From this decision, *Sree Narain Rae* and *Lullit Narain Rae* appealed to the Sudder Dewanny Adawlut, stating and insisting that the Decree of the Provincial Court was contrary to justice and law, and that from the contradictory manner in which *Bhya Jha* had at different times stated his appointment, or adoption, to be the *Khurta Pootra* of the *Ranee*, he was not entitled to sue as such, and ought not to have been so considered;—that the *Ranee* had no authority to give away the property of her husband;—that the claim made by *Bhya Jha* was inconsistent, since in the Zillah Court at one time he alleged that he was entitled to the whole of the property left by the *Ranee*, by virtue of his appointment, as *Khurta Pootra*, according to the law and usages of *Tirhoot*, without any donation or declaration of the *Ranee*, while at another time he pretended that the *Ranee* had declared him to be the proprietor of all her property, moveable and immoveable; that if he had been in fact appointed *Khurta Pootra*, he would have communicated that fact to the Zillah Judge, when he proceeded to attach the property of the *Ranee*;—that by an order of the Sudder Court on the 26th *September* 1804, it had been recorded that the Appellants had denied the adoption of the Respondent, and had urged many objections against the *Soluhnamah*, which objections had not been controverted, or judicially examined. The Petitioners also alleged that doubts had been entertained

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by the Sudder Court, respecting the validity of the Respondent's claim, and that the Court had declared, that it was induced to believe that the *Soluhnamah* had been improperly obtained for the purpose of preventing a due investigation of the claim which had been preferred by *Bhya Jha*. They stated also, that they had insisted that *Bhya Jha*'s claims to the property in question should be judicially investigated, but that no such investigation had taken place; and that the Sudder Court, when it directed *Bhya Jha* to institute a regular suit in support of his claim, meant thereby to put him to elect to sue either for the entirety of the property as *Khurta Pootra*, or for the moiety thereof, under the agreement contained in the *Soluhnamah*; that the Respondent accordingly made his election and disclaimed that to which he might have been otherwise entitled, under the *Soluhnamah*, and preferred his claim as *Khurta Pootra*. That although it had been declared by the Sudder Court, that it was necessary for the ends of justice, that the claims of *Bhya Jha* as *Khurta Pootra* should be judicially investigated, yet the Provincial Court had refused to require, or receive proofs of the fact of the Respondent's adoption, and had made their decree on the same facts which had been before the Sudder Dewanny Adawlut, when it had declared, that further investigation was necessary for the ends of justice. That the Respondent in the Court below, having claimed the whole of the property in dispute, in virtue of his adoption, as *Khurta Pootra*, it was not competent for him, under the Regulations, by a supplementary petition to proceed on the *Soluhnamah*. The decree therefore of the Provincial Court was contrary to the Order of the Superior Court, and in opposition to the

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claim asserted in the petition of plaint, and the Provincial Court decided on a claim irregularly preferred, which had been previously abandoned, and which had not undergone any judicial investigation. The Appellants also urged, that according to the practice of the Provincial Courts, established by the Regulations, the claims and merits of all cases were required to be maintained in the plaint, answer, replication, and rejoinder, and that according to such Regulations, and the practice of the Courts, the opposite and inconsistent claims which had been brought before the Court of *Moorshedabad* ought not to have been admitted. That *Bhya Jha*, in his petition of plaint, expressly declared, that in consequence of the renunciation of the *Soluhnamah*, or deed of compromise, by *Sree Narain Rae* and *Lullit Narain Rae*, he preferred his claim to the whole of the property left by the *Ranee*; that he had therefore positively and expressly waived his claim to the moiety of the estate, in virtue of the *Soluhnamah*, and had asserted and extended his right to the whole as *Khurta Pootra* and donee of the *Ranee*; and the Petitioner further alleged, that *Bhya Ram Misser*, who prepared the *Soluhnamah*, had employed stratagems and artifices to defraud and intimidate the Appellants; that the Collector had told them that the contest never would be terminated, and that they would be reduced to poverty and distress if they persisted in litigation; that the *Zemindary* had been placed under the superintendence of a public officer of Government; that the Appellants were persons who had chiefly resided in the country, and had but little intercourse with the city or capital, and were alike unacquainted with the provisions of the Regulations and the usages of the Court; that they were

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utterly unsuspicious of the artifice or fraud practised on them by the Respondent and his agents, and that the *Soluhnamah* was prepared and drawn under the direction of *Bhya Ram Misser*, and that the language and composition of it clearly demonstrated that it had not been prepared or written at the instance of the Appellants, and that, therefore, the Provincial Court ought not to have pronounced for the validity of that instrument. The Appellants also submitted, that if the Respondent had been entitled to a moiety of the *Ranee's* property, in virtue of the *Soluhnamah*, and without further investigation, the same would have been decreed by the Sudder Court, when that instrument was regularly brought before it; but they insisted that the Respondent had taken undue advantage of their ignorance of their lawful rights, and had thus obtained the instrument in question, which ought, on that account, to have been declared null and void, and that moreover the parties, at the time of the execution of the *Soluhnamah*, were not in possession of, and exercised no authority over, the property which constituted the subject of the *Soluhnamah*, which was, therefore, prematurely executed, contrary to Hindoo law. That the validity of the *Soluhnamah* could not have been maintained, unless the adoption and appointment of the Respondent to be *Khurta Pootra*, and to be master of the property in dispute, had been clearly and satisfactorily established, and the admission of that fact contained in the *Soluhnamah* ought not to have been received as conclusive evidence of such fact, when it was specifically alleged that such fact had never existed, and the instrument and its admissions had been obtained by fraud.

Bhya Jha, by his answer to the Appellant's reasons

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of appeal, asserted the validity of the Deed of Compromise, and that the Judges of the Provincial Court had decided justly. That although he had, by his Petition of Plaint, claimed the whole of the *Ranee's* property as *Khurta Pootra*, yet he had also in the same petition stated the particulars of the *Soluhnamah* under which he was entitled to a moiety of the property: that his witnesses had attended the Provincial Court to prove his case and his adoption: that one witness had actually been examined, and that he had frequently petitioned the Provincial Court to examine his other witnesses, but that his application was not complied with: that the Provincial Court had considered the admissions contained in the *Soluhnamah* as affording sufficient evidence to establish the validity of that instrument, and that thereupon they had pronounced him entitled to a moiety of the property in dispute; that when he should obtain possession of a moiety of the property thus decreed to him, he should consider whether he was not entitled to appeal to the Sudder Dewanny Adawlut against the decree of the Provincial Court, inasmuch as it had not decreed to the Respondent the whole of the property which he had claimed as *Khurta Pootra*; that he had not renounced his claim founded on the *Soluhnamah*, and that such instrument had not been obtained by misrepresentation or intimidation; that he had filed a supplementary petition, asserting his claim under the *Soluhnamah*; and that such petition was not objected to by the Appellants, and was admitted and received by the Provincial Court; that he was entitled to prefer his Plaint in any manner he deemed most desirable, and that it was the duty of the Judges to ascertain whether he was entitled to the whole or to a part only

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of what he had claimed; that even if the Respondent had not expressly preferred his claim under the *Soluhnamah*, the Provincial Court, on the perusal of that instrument, which had been regularly brought to its notice, would have been justified in pronouncing the decree which was then impugned; that it appeared from the deposition of Mr. *Laing*, who had been Collector of the *Zillah Poorneah*, and which had been taken in the Nizamut Adawlut on the 1st of *April* 1809, that the Appellants had frequently applied to him on the subject of their claims, and the claim of the Respondent, and that Mr. *Laing* had advised them to agree to a settlement between themselves without a suit in Court; that the Appellants had then stated to Mr. *Laing*, that when they wished to speak to the Respondent on the subject of entering into an amicable agreement, it was difficult to see him, or to have any conversation with him, for he was surrounded by his advisers; that he (Mr. *Laing*) thought the Appellants had requested him to advise the Respondent to make a settlement, to which Mr. *Laing* replied, "that it was so desirable to compromise, that there was no necessity for advice," and that in fact he did afterwards advise him to agree to a compromise. The Respondent therefore contended, that it appeared from this deposition that the Appellants had first mentioned the subject of the settlement; that he had no wish to any collusive or irregular settlement with them; on the contrary, he wished to have no intercourse with them. He further contended, that the petition, which was afterwards presented to the Collector by the Appellants, and the answers given by them to the Zillah Judge when interrogated respecting the *Soluhnamah*, abundantly contradicted the assertions

contained in their Petitions of Appeal. That these acts, and the admissions of the Appellants in open Court, clearly proved that they had not been imposed on by misrepresentations, and that the Appellants had not then conceived the intention of imputing the execution of the *Soluhnamah* to conspiracy or fraud. That the *Soluhnamah* was attested by respectable witnesses, including the *Vakeels* of the Appellants. That after these solemn admissions of the adoption of the Respondent, the Appellants ought not to be allowed by a court of justice to deny the fact.

The Appellants replied to this answer, insisting that, according to the Hindoo law, when one or more persons, not having property at his or their disposal, enter into an agreement between themselves, in expectation that the property will thereby be obtained, such an agreement is not valid, and cannot be sustained, and that an agreement respecting property can only lawfully apply to that which is in the actual possession of one of the contracting parties. The Appellants also contended, that *Ram Narain* was a party to the *Soluhnamah*, and that it had been determined that he was not entitled to any benefit in virtue of the *Soluhnamah*. That if it was inoperative with respect to *Ram Narain's* interests, inasmuch as he was not otherwise entitled to participate in the estate of the *Ranee*, it ought to be deemed for the same reason insufficient to sustain the claims of the Respondent. They also insisted that the rights of *Bhya Jha*, under the *Soluhnamah*, entirely depended on the due proof of his title of *Khurta Pootra*, and of the donation of the *Ranee*; and that no such proof had been submitted to the Provincial Court; and that even if it were satisfactorily proved that he had been appointed *Khurta Pootra* to the *Ranee*, that appointment would not entitle the

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Respondent to the property of the *Rajah*. To this the Respondent rejoined.

The widow of *Deo Narain*, as the mother of *Ram Narain*, claimed to be associated with the other parties' Appellants, in order to obtain a share of the property of the *Ranee*, but her claim was not sustained by the Sudder Court.

At this period of the cause, *Lullit Narain Rae* died, leaving a widow, but no children, him surviving.

The Appeal being thus before the Sudder Court, the Judge of that Court, with the view of ascertaining the Hindoo law applicable to the case, referred the proceedings, with the following questions, to the Pundits of the Court:—

"Supposing *Bhya Jha*, though constituted the *Ranee's* adopted son, and *Malik* of her property, not legally entitled to any part of the property in the *Ranee's* possession at the time of her death, besides the *Streedhun*,* whether there be any texts in the *Mitheela* law-tracts, authorizing the Appellants to resist the enforcement of the Deed of Compromise, voluntarily executed by them, on the plea of ignorance on this point when the deed was executed?

"Whether the Appellants can object against the enforcement of the Deed voluntarily executed by them, on the plea, that since the time of executing it they have ascertained that the *Ranee's Streedhun* amounts to an inconsiderable part of the estate?

"Whether there be any authority for annulling the conditions of the Deed on the grounds stated by the Appellants; that at the time of its execution the property therein referred to was not in the possession of either party, but under attachment by the Zillah

* The sole property of a woman, possessed and transmissible independently of her husband.

Court till it could be ascertained who were the legal heirs; that there were other claimants to the estate, and that owing to the objections of the Appellants, the Respondent had not obtained possession of the estate by virtue of the deed?"

To which questions the *Pundits* answered:—

"If *Sree Narain Zae* and *Lullit Narain Rae*, the heirs of *Rajah Inder Narain Rae*, without fraud on the part of *Bhya Jha*, with their own free will, signed the Deed of Compromise, they are not at liberty under the *Mitheela* law, to avoid the conditions of the deed, (by which half of the property was agreed to be given up to *Bhya Jha*,) on the plea that they were ignorant at the time of executing the deed; that besides the *Streedhun*, *Bhya Jha* was not entitled to any of the property possessed by the *Ranee*; and that they have, since the execution of the Deed of Compromise, ascertained that the *Streedhun* property, left by the *Ranee*, bears a very small proportion to half of the entire property possessed by her at her death; for there is no text authorising the setting aside a deed of this nature on a plea of ignorance, although at the time the Deed of Compromise in question was executed, the property real and personal, which devolved to the *Ranee* from *Rajah Inder Narain Rae*, was under attachment by the Court, on account of the rightful heirs not having been ascertained; and although in consequence of the objections of the Appellants, *Bhya Jha* had been kept out of possession, yet under the law of *Mitheela*, the aforesaid Deed will not be void, for there is no text by which possession of the subject of an agreement is declared necessary to its validity."

On the 12th of *September* 1810, the cause came on

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for consideration before Mr. *Harrington* and Mr. *Stuart*, and it was resolved to remit the cause for the purpose of taking evidence both as to the fact of adoption and the circumstances under which the Compromise had taken place.

Witnesses were examined by the Provincial and Zillah Courts, under the orders of the Court of Sudder Dewanny Adawlut, with respect to the fact of adoption of *Bhya Jha*, by the *Ranee*, and also as to the fraud and intimidation stated to have been used by *Bhya Ram Misser*, acting, as it was alleged, on behalf of *Bhya Jha*.

The witnesses for *Bhya Jha* proved that the *Ranee* had constituted *Bhya Jha* her *Khurta Pootra*, or adopted son, and made over to him her property real and personal.

Mr. *Harrington* and Mr. *Stewart*, the first and third Judges of the Sudder Court, filed a long and elaborate opinion in favour of the claim of *Bhya Jha* under the *Soluhnamah*. The Sudder Dewanny Adawlut on the 27th of *July* 1812, pronounced their final Decree as follows:—

"In the opinion of both the said Judges, in consideration of the pleadings, the depositions of the witnesses, the *Bewustas* of the *Pundits*, and all the other papers in this cause, the objection of the Appellants to the right of *Bhya Jha* to the *Soluhnamah*, executed on the 27th *Aughun* 1211, *Moolki*, (11th *December* 1803,) are not valid and sufficient. Wherefore, the decree passed by the Provincial Court of *Moorshedabad*, on the 28th *July* 1809, which ordered *Bhya Jha* to be put in possession of a moiety of the contested property, and also of the produce arising therefrom, since the time that *Sree Narain Rae*, and

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Lullit Narain Rae, have had possession, ought to be confirmed. Moreover, *Bhya Jha* is entitled to a moiety of the entire property left by the *Ranee Indrawuttee*, specified in the petition of plaint in this Court, which the Provincial Court in their decree ordered to be placed in deposits until there was a decision given on the claims of the other claimants to the property under trial in any Court, except the present: therefore an order and final decree was passed, confirming the decree passed by the Provincial Court, on the 28th of *July* 1809, that *Bhya Jha* should receive a moiety of the landed estate, assessed, and rent free, furniture, cash, and other property, moveable and immoveable, left by the *Ranee Indrawuttee*, deceased, which were given in possession to *Sree Narain Rae* and *Lullit Narain Rae*, deceased, in the summary inquiry, and are now, in addition to the cash, Company's paper, and other property, which, by order of this Court, were placed in deposit in the Zillah Court, in the hands of the Appellant, *Sree Narain*, with a moiety of the produce arising from the landed estate, and expended by *Sree Narain* and *Lullit Narain*, during the time it was in their possession, till the year 1215, with the interest thereon, at the rate of twelve *per centum per annum*, at the end of each year, and a moiety of the Company's paper is placed as a deposit in the Zillah Court for the produce of 1216, 1217, and 1218, from *Sree Narain Rae* (who is in possession of his own and the late *Lullit Narain Rae's* share, with his share of the interest thereon); and it is incumbent on the Zillah Judge, to put the Respondent in immediate joint possession of one half of the landed estate, according to the Regulations; afterwards, if the parties, or either of them, shall petition to have the landed estate divided, they

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ought, according to Regulation V, 1810, to file a petition before the Collector; whereas this cause is decided according to the *Soluhnamah*, in which there is a stipulation to take joint possession, with the power of afterwards dividing the property: therefore the expense of division will fall, half and half, on both parties; and the Judge of the Zillah Court, in carrying into execution this decree, having given to *Bhya Jha* one half of the Company's cash, paper and other property in deposit, will keep the remainder in deposit until further orders: and having required from *Sree Narain Rae* an account of receipts from the disputed estate, from the time that *Sree Narain Rae* and *Lullit Narain Rae* obtained possession till the issuing of this decree, and allowed for the necessary disbursements, the Government revenue, the money in deposit, the profits of the years 1216, 1217, and 1218, which were placed in the Court, without any account of them; and having, in the presence of both parties, made an accurate account of the entire remaining profits of each year, he will send the particulars of it, with the necessary papers for the information and approval of this Court; after which, such orders as may be right will be passed with respect to *Bhya Jha's* receiving a moiety of the profits coming to him. Whereas the objection of the Appellants, *Sree Narain Rae* and *Lullit Narain Rae*, deceased, to the *Soluhnamah*, on which the decree given by the Provincial Court was formed, were not thoroughly inquired into, on which account the appeal to this Court was not without foundation; therefore, the costs of suit of both parties are not to be at the expense of the Appellants." And it was ordered, that both parties shall be answerable for the costs of suit in this Court.

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6 June, 29 November, 1836.*

At the period of the presentation of the Appeal, the Appellants were infants under the protection of the Court of Wards, and the Agent, *Robert Walter Poe*, whom that Court had nominated to prosecute the Appeal on their behalf, and to take charge of their interests, though supplied with ample funds for that purpose, misapplied those funds, and wholly neglected their interests, having abandoned the country. In consequence of this neglect, the Appellants were unable to prosecute the Appeal.

On the 29th of *July* 1833, a peremptory order was made by the Privy Council, directing the Appellants to deliver printed cases within a fortnight, otherwise the Court would proceed to hear the case *ex parte*.

The Appellants having neglected to comply with this order, the case came on *ex parte* on the 5th of *April* 1834, when no Counsel appearing for the Appellants, an order was made affirming the decrees of the Court, and dismissing the Appeal with costs.

In *December* 1835, the Appellants presented a petition to have the order for dismissing the Appeal, and affirmance of the judgment of the Court below recalled, and for leave also to prosecute their original

By the common law this Court possesses the same power as the Courts of Record and Statute have, of rectifying mistakes which have crept in by misprision or otherwise, in embodying its judgments.

Where, therefore, an order had been made *ex parte*, upon the appearance of the Respondents alone, for the dismissal of an appeal and affirmance of the judgment of the Court below, which purported to be upon the hearing of the cause, the Judicial Committee held that such order must be held simply as a dismissal; and it appearing that the Appellants were infants, under the protection of the Court of Wards in *India*, and that the agent appointed by the Court to act as their guardian *ad litem*, in the matter of the Appeal, had absconded, and abandoned the cause, their Lordships rescinded the order of dismissal, and restored the Appeal on the terms of the Appellants paying the costs and giving access to the transcript of the proceedings in the Court below, in their hands, and undertaking to lodge cases within five months.

* Present: Members of the *Judicial Committee*,—Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, and the Chief Judge of the Court of Bankruptcy.

Privy Councillors,—*Assessors*, Sir Edward Hyde East, Bart., and Sir Alexander Johnston, Knt.

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Petition of Appeal, or to file a new petition, as they should be advised.

The Petitioners set forth the grounds of appeal as contained in the original Petition of Appeal; and after stating the facts above mentioned, and that one of the Appellants, *Rajunder Narain Rae*, attained his age of 18 years in *October* 1830, and was consequently of age, but that the other Petitioner, *Coower Mohunder Narain*, was still a minor, proceeded to state, that in consequence of the very great importance of the case to the Petitioners, the great value of the property in question, and the great loss they would sustain if the judgment pronounced against them were allowed to remain without their being permitted to prosecute the Appeal; they had incurred the expence of sending their own solicitor, for the purpose of attending to their interests, and to prosecute without delay their Appeal, if he should be permitted to do so; and they submitted, that where an Appeal is dismissed on account of, and through the wilful neglect of, the guardians of infants to bring it to a decision, the infants, when they come of age, ought to be permitted to have the Appeal restored or revised, and that under all the circumstances of the case, and more especially by reason of their infancy and inability to prosecute the Appeal to a hearing at an earlier period, and the circumstance that the agent's negligence and misconduct had been the cause of the delay and miscarriage which had occurred, and that he was appointed by the Regulations of the Supreme Government to act for the Petitioners, they ought not in a matter of such great value, and so highly important to their interests, to be deprived of an opportunity of having the same heard on its merits. The Petitioners

also stated that they were advised that they had a good case on the merits, and prayed that the order dismissing their Appeal for want of prosecution might be recalled, and that, on payment of the costs, they might be permitted to prosecute their original Appeal.

The petition was supported by affidavits.

Sir *Charles Wetherell*, K. C., with whom was Mr. *J. Stuart*, for the Appellants.

Sir *Charles Wetherell*:

The order of the 16th *April* 1834, affirming the judgment of the Court below, and dismissing the Appeal, is wrong; it ought to have been only for a dismissal, and must be held to operate as such. The first part of the order is mere form; it cannot be intended that the judgment of the Court below should be affirmed by this Court, which to this moment is uninformed of the grounds of that judgment. It may be absurd or unjust, or even illegal, and yet if really affirmed, it would be the law, and binding on all courts in similar cases; such a position will not bear argument. The order is erroneous on the face of it; it purports to be on the hearing of counsel; there was no hearing, the case was merely opened, *pro formâ*, by the Respondent's counsel, none of the facts or circumstances were stated, nor was the Court informed that the Appellants were infants: the merits were not gone into, nor was the magnitude of the property mentioned. The special circumstances on which the order purports to have been made are not true. Where there is palpable error on the face of an order, the power to correct such is incident to the Court by which it has been made; the error here is clerical, it is a mis-statement of the circumstances under which the Court pro-

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nounced its decision; there is no court of law or equity in which such an error would not be amended. No printed case was put in by the Appellants; can the printing of the Respondent's case be said to be a hearing? The amount of the property in question is £60,000 per annum; how could the Court know anything of the facts, unless the case was stated on both sides? Yet the order is to affirm the judgment below on the hearing of the Appeal. It was never stated to the Court that this was the case of infants, whose interests were under the protection of the Court of Wards. That Court appointed *Poe* to act as their agent in this country; he was not the personal guardian of the infants, but the mere agent of the Court of Wards, and was, at the utmost, but a guardian *ad litem.* No application was made to enlarge the time, nor was it stated at the hearing (if such it can be called) that the agent of the Court of Wards had absconded. Could the Court have made an order to dismiss the Appeal, if they had known that fact?

The rights of an infant cannot be prejudiced by the acts of his guardian; that is part and parcel of the law of *England.* *Kelsall* v. *Kelsall* * establishes the right of an infant to put in a fresh answer on coming of age, though a decree has been made against him upon his appearance and answer by guardian; he may even state a new case, and go into evidence in support of it. If such is the course in the Court of Chancery, how can it be contended here that he is precluded by his guardian's default? By the law of *Scotland,* "Restitution lies not only against extrajudicial but judicial acts, *exempla gratia,* the sentence of a judge,

* 2 Myl. & Keene, 409.

though pronounced in *foro contradictorio*, where the proper assignations or defences, either in law or in fact, have been omitted, or when others, false in fact or hurtful to the minor, have been offered to the Court by his guardians."* In *The Orphan Board* v. *Van Reenen*,† it is laid down as a position not to be disputed, that "infants are not to be prejudiced by the negligence of their guardians;" and the Court held that the Appeal having been dismissed on account of the neglect of the guardians of the infants to bring it to a decision, the infants, on coming of age, had a right to revive it. If the order here operates merely as a dismissal, as I contend it must, the authority of that case is conclusive. The Privy Council dismissed the Appeal for want of information, concluding the party *in culpa* who was not *in culpa*; it is therefore perfectly competent for your Lordships to advise His Majesty to rescind an order made in ignorance of the facts, and which consequently contains statements directly at variance with the facts. The Lord Chancellor is accustomed to exert a similar authority when he orders a patent to be rescinded by *fieri facias*.

Mr. *J. Stuart*:

It is no fatal objection to this application that the report made on the hearing of the cause has been confirmed by the King in Council. Admitting this to be a Court of last resort, there is no authority for maintaining such to be the practice. A decree made in default of one party, does not stand in the same light as a decree made on the hearing of both parties. Such a decree is never treated as *lis judicata*. The statement on the face of the order is, that it was made on

* Erskine's Inst. I. tit. 7, sec. 38. † 1 Knapp, 83.

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the appearance of one party only: that makes the order, in fact, only a dismissal for want of prosecution. Where, as in this case, the default is by the party complaining, the business of the other side is not active. A Respondent is never an actor, except to rid himself of the Appeal. The affirmance of a decree is a solemn act, and can never be said to have been intended in the absence of the party complaining of the decree. The justice of the case is satisfied by the simple dismissal of the Appeal; the Respondent has no right, nor does he suffer any hardship. That is the course in the Court of Chancery; in *Palmer* v. *Palmer*, 5th *November* 1836, on appeal to the Lord Chancellor, the Appellant not appearing at the hearing, the Appeal was dismissed with costs; there was no affirmance of the judgment below. It is impossible to carry the case higher than one of dismissal for want of prosecution. As to the merits, they were never entered into; and there is no contradiction to the affidavit made in support of the present application. The cases cited show that there may be cases of affirmance of a judgment below, where the infant has by his guardian appeared and been a party at the hearing, and which notwithstanding, the Court will review; but here there was neither hearing, in the proper sense of the word, or materials for hearing.

Mr. Serjeant *Spankie* and Mr. *Stinton*, for the Respondent.

This is an application to change the practice of this Court. The rule has hitherto been, that where an Appellant makes default at the hearing, the judgment below is affirmed; that has always been understood to be the course. If a contrary practice is now intro-

duced, the inconvenience that must result is inconceivable: there is no case in which such an application as the present may not be made, and your Lordships will be occupied with applications for re-hearings in every cause that has been heard *exparte*. The order of 16th *April* 1834, only purports that the cause was heard in the usual manner, and the usual order made. The petition for re-hearing is *in misericordia*, and your Lordships will weigh very maturely any advice you may deem it right to give for the alteration of a practice that has so long prevailed. With respect to the merits, as far as they appear upon this petition, the parties have not been damaged. The decree appealed against was pronounced in 1812. The regulation of the Sudder Court is, that an appeal must be prosecuted within six months after the decree is pronounced, unless by special leave of the King in Council;* the father of the present Appellant had the judgment standing against him for nine years. The Statute of Limitations runs against infants as well as adults; twelve years is the period within which a demand can be made here; of that period nine years had expired. They make no case to ask for a review, and the question is, whether your Lordships will let them in under this petition to open the whole proceedings in the Court below. Where there has been laches, the Courts are not accustomed to grant such indulgence, even to an infant. *Fraser*, the agent on the other side, knowing the defalcation of *Poe*, ought to have applied to the Court of Wards. It is said that he applied to the East India Company, but that was

* Bengal Regul. xvi., A. D. 1797.

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vain and nugatory; they had nothing to do with it: he ought to have appeared at the hearing, and stated the facts now insisted on; that might have induced the Court to stay the hearing of the Appeal till further inquiry had been made; more than a year was allowed to elapse before any steps were taken to revive the Appeal; we stand upon the fact that the Appeal was dismissed. The consequence of admitting the application now made will be to unsettle the whole practice of this Court.

Lord BROUGHAM:

14 December 1836.

This was a petition to re-hear the cause upon which their Lordships had given their judgment on the 16th *April* 1834, after an order of the 29th *July* 1833, calling on the Appellants to deliver printed cases in a fortnight, otherwise their Lordships would proceed to hear the cause *exparte*; no cases were delivered, and the cause came on accordingly. The Appellant not appearing, an order was made in what is understood to have been the usual form in the Privy Council in such cases; it was, that after hearing the counsel for the Respondent, and no one appearing for the Appellants, the Decree appealed from be affirmed, and the Appeal dismissed with costs. This order was confirmed, that is to say, the report of their Lordships was adopted, and made an Order of the King in Council.

The ground of the present application is, that there has been no hearing, but that the affirmance was pronounced merely on the Appellant making default. This it is contended entitles their Lordships to amend the Order, and advise His Majesty to revoke the con-

firming Order; and if the power do so exist, the Appellant then contends that it ought to be exerted in this instance, inasmuch as he makes out a strong case for the indulgence of the Court. The parties were infants under the Court of Wards in *Calcutta*, and appeared by a public functionary, through the appointment of that Court, as their guardian *ad litem*. This person neglected the case altogether, and not only did not provide funds for carrying it on, but absconded with funds in his hands which had been allowed for the expense of the suit, and he was not to be found when the agent here desired to communicate with him; nor has he since returned. Although some delay occurred in prosecuting the Appeal during the lifetime of the party, the father of the infants, who had commenced the Appeal, it is clear that the infants had been substituted in his room, and steps had been taken which waived any objection on the ground of his laches; and whether this was waived by the Respondent or by the Court is immaterial for the present purpose; the case for indulgence is, therefore, a strong one, provided there is the power to grant this application.

It is unquestionably the strict rule, and ought to be distinctly understood as such, that no cause in this Court can be re-heard, and that an Order once made, that is, a report submitted to His Majesty and adopted, by being made an Order in Council, is final, and cannot be altered. The same is the case of the judgments of the House of Lords, that is, of the Court of Parliament, or of the King in Parliament as it is sometimes expressed, the only other supreme tribunal in this country. Whatever, therefore, has been really determined in these Courts must stand, there being no

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power of re-hearing for the purpose of changing the judgment pronounced; nevertheless, if by misprision in embodying the judgments, errors have been introduced, these Courts possess, by common law, the same power which the Courts of Record and Statute have of rectifying the mistakes which have crept in. The Courts of Equity may correct the Decrees made while they are in minutes; when they are complete they can only vary them by re-hearing; and when they are signed and enrolled they can no longer be re-heard, but they must be altered, if at all, by Appeal. The Courts of Law, after the term in which the judgments are given, can only alter them so as to correct misprisions, a power given by the Statutes of Amendment. The House of Lords exercises a similar power of rectifying mistakes made in drawing up its own judgments, and this Court must possess the same authority. The Lords have, however, gone a step further, and have corrected mistakes introduced through inadvertence in the details of judgments; or have supplied manifest defects, in order to enable the Decrees to be enforced, or have added explanatory matter, or have reconciled inconsistencies. But with the exception of one case in 1669,* of doubtful authority, here, and another in Parliament of still less weight in 1642 (which was an Appeal from the Privy Council to Parliament, and at a time when the Government was in an unsettled state), no instance, it is believed, can be produced of a re-hearing upon the whole cause, and an entire alteration of the judgment once pronounced.

It may be material to observe in what way the House of Lords has exercised this power of correcting errors

* Dumaresq v. Le Hardy. 11 March 1667-68.

which have occurred in drawing up the judgments pronounced. The cases are chiefly where some trivial mistake made it impossible to carry the decree into execution, as in *Hill* v. *Spence*,* *April* 1808; a reference having been directed to the Master of the Exchequer in *Ireland*, and there being no such officer, their Lordships amended the order by inserting "the Chief Remembrancer or his deputy:" or for the purpose of supplying a plain omission and executing the manifest intention of the decree, as in *Dent* v. *Buck*,† *March* 1702, where an order had been made, reversing the decree of the Exchequer in *England*, affirmed in the Exchequer Chamber, dismissing a bill for tithes, on the foot of an agreement, and no direction had been given to proceed on hearing or determining the right to tithe. This direction was added to the judgment of reversal. Or where, as in *Oundle* v. *Barton*,‡ *January* 1692, a charity information had been dismissed, and the Lords reversed the decree of Lord Chancellor *Jeffries*, dismissing, but gave no decree for establishing the charity, and the Lords Commissioners had refused to make such decree. Upon the petition of the Attorney-General (Sir *John Sommers*) the House of Lords amended their former order by adding a direction to decree for the prayer of the information. So where the Courts below had misunderstood the orders of the House, to save new appeals, explanatory additions have been made, with orders setting aside whatever had in the meantime been done below under the misapprehension, as was done in *Calthorp* v. *May*,§ *April* 1712. But the instances are numerous, and at all times, of rejecting applications for rehearings and fundamental

* Lords' Journ. 46 vol., 536.

† Lords' Journ. 17 vol., 76. Collis. Parl. Cases, 182.

‡ Lords' Journ. 15 vol., 170. § Lords' Journ. 19 vol., 435.

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alterations, on whatever grounds made; and often in cases of apparent merits and great claims to indulgence.

Their Lordships have carried their discretionary power of alteration no further than to rectify errors of a subordinate kind, and, in very peculiar circumstances, to indulge parties by keeping partial questions open, which the decree had concluded, without there having been any distinct intention of that kind on the part of the House. The cases which have gone the furthest in granting such indulgences, and in rectifying such errors, are *Sedgwick* v. *Hitchcock*,* *December* 1690; *Page* v. *Hamilton*,† *May* 1809; *Agnew* v. *Dunlop*,‡ *March* 1823. In the first case the Lords Commissioners had declared a mortgagee only entitled to £800 out of £2,200 claimed by him on his mortgage, and had ordered that the deed should be delivered up, and the residue divided among the other creditors. The Lords reversed this decree, and ordered the party to be treated in every respect as a mortgagee, paid his full mortgage money, with interest, costs, &c. The other creditors applied to the House to rehear and alter. The House refused to allow any rehearing except on one point, the application to be permitted to try their title at law. This was granted; the judgment being amended by striking out all after the order reversing the decree below, namely, directing to sell and distribute, excluding the mortgagee, and instead of the part struck out, inserting an order that the Respondents be allowed to try their title at law. Afterwards, by a second amendment, their Lordships, on the Appellant's application, added a particular direction in furtherance, however, of their former one, that the question should be parti-

* Lords' Journ. 14 vol., 601. † Lords' Journ. 47 vol., 116 & 322.
‡ Lords' Journ. 55 vol., 565.

cularly tried whether or not the mortgage deed had been fraudulently obtained. It is to be observed, as Lord *Redesdale* has remarked, that proceedings of this kind were more frequent during the long period immediately after the Revolution, when the Great Seal was in commission, and the Speaker of the House of Lords was a commoner, and could take no part in its debates.

In *Page* v. *Hamilton*, 1809, the House, after hearing counsel, rectified several material errors which had been introduced into an order of *August* 1807, the order of amendment stating expressly that the original judgment had directed variations of the decree below, inconsistent with the parts of it affirmed by the same judgment, which rendered the decree contradictory ; and that it had described parties as trustees who were not trustees, and directed an account against them in a character which they did not sustain. The ground of the amendment here allowed expressly is, that the order amended had been framed under a mistake as to the variations which the House really agreed to make in the decree appealed from. This amendment was made upon great consideration, and after a Committee had been appointed to search for precedents.

The last case mentioned is that of *Agnew* v. *Dunlop*, in 1823, in which an application to rehear the very important judgment that had been given was without hesitation refused. But it being represented that the order reversing the decree appealed from, and adjudging the estates in question to the Appellant, had also decided in his favour another question, which had not been argued at the bar, namely, his claim to the rents and profits since the title accrued, the House took this into consideration. It is certain that the

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question was adverted to in the printed cases, and though not argued at the bar, that it might have been argued: and that the Respondent might have taken, at the hearing, the objection which he now put forward, that the matter had not been argued in the Court below. All this is stated in the preamble of the order made by their Lordships on the application to amend, in which counsel were heard. Nevertheless their Lordships, "conceiving that the neglect of the Respondents, either to discuss the question on the hearing of the Appeal, or to request that it might be remitted to the consideration of the Court below, arose from the mistaken apprehension that the House of Lords could not regularly hear it because it had not been discussed below," think fit, "*under the particular circumstances of the case*, to order that the judgment be amended by omitting the words &c.," that is, the part of the judgment disposing of the question of debts and profits, which is saved entire for both parties to proceed upon in the Court below.

It is impossible to doubt that the indulgence extended in such cases, is mainly owing to the natural desire prevailing to prevent irremediable injustice being done by a Court of the last resort, where by some accident, without any blame, the party has not been heard, and an order has been inadvertently made as if the party had been heard.

Where a party makes default in any of the Courts below, and the judgment is perfected against him upon that default, it cannot be amended upon any suggestion, unless there has been misprision, and the judgment has been entered contrary to the truth of the proceedings, as judgment for the defendant instead of nonsuit. So where on writ of error the plaintiff does not appear

after joinder in error, the judgment is of affirmance. But in this case no final judgment can be said to be pronounced, because the party making default may proceed again. Whereas if in the Courts of the last resort, the like judgment of affirmance be pronounced, the matter is final, and that judgment stands as a precedent in whatever points were raised in the cause. For this reason, where the Appellant or the Plaintiff in error does not appear in the House of Lords on his writ or appeal coming on for hearing, the judgment is to dismiss merely, and not to affirm, unless their Lordships have considered the merits of the case.

This they may do whether the party appealing shall appear or not, for they may consider the cause upon the printed cases laid before the House, though one of the parties does not appear to argue the question, or even though neither party argue it; nay, though there be no printed cases delivered in, provided that the proceedings in the Court below, being before their Lordships, are by them taken into consideration, and that the matter in question appears in the proceedings, there seems to be nothing which should absolutely preclude them from giving judgment either against or for the absent party. But then there must have been a hearing of the case, and on both sides; that is, either a hearing at the bar, or by the cases delivered, or by examination of the whole proceedings below, as well on the one side as on the other. In no other circumstances would it be safe to give a judgment of affirmance in the last resort, that judgment making a precedent binding on all other Courts, and that judgment also being conclusive for ever between the parties.

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The safer and better course seems to be, that where the Appellant does not appear, and there are no means of knowing the grounds of his appeal, the order should be to dismiss without affirming. In this case he could not be let in to renew his appeal without satisfying the Court as to the grounds of default, and complying with such conditions as should be prescribed. Where the Respondent appears not, *ex necessitate* the Court must hear and determine the case upon the best consideration of its merits which the matters before the Court enables it to give; but in neither case can the judgment be pronounced as of course for the party appearing, merely on the ground of the other party's absence.

In the present case the form has been adopted which has been used in a great majority of instances, where the Appellant did not appear at the hearing. It is not, however, known whether, in these instances, there were or not cases laid before their Lordships, or such access to the proceedings below, and such recourse had to these proceedings as might enable their Lordships to supply the defect occasioned by the Appellant's default; and in at least one instance, the order was made, as it ought to have been made here, simply dismissing the Appeal, and not affirming the decree below. Their Lordships consider that a simple dismissal is to be regarded as the order which must have been in the Court's contemplation, and that no more could have been intended in substance, although the objectionable form, importing affirmance, was followed.

We, therefore, think that, in the particular circumstances of this case, His Majesty should be advised to amend the order of the 16th *April* 1834, by making it

conformable to what it must be taken to have intended, and to let in the Appellant to be heard notwithstanding the dismissal, that is to say, to restore the Appeal; and in case His Majesty shall be pleased so to order, that these conditions shall be imposed upon the Appellants, namely, payment of Respondent's costs occasioned by the default in *April* 1834, and by this application; and that he shall now lodge cases within five months; and to permit the Respondent to take copies of any part of the proceedings in his possession, at the charge of Respondent, and undertake to disturb nothing done from the date of the judgment, until notice is received of this order.

The following order was made in conformity with the above judgment by the King in Council, on the 22nd *December* 1836; "That His Majesty's Order in Council on the said Appeal of the 16th *April* 1834, be amended, by striking out so much of the said order as affirms the decree of the Sudder Dewanny Adawlut, at *Fort William* in *Bengal*, of the 27th of *July* 1812; and it is hereby further ordered, that so much of the said order of the 16th of *April* 1834 as dismissed the said Appeal with costs, and the same is hereby rescinded; and that the said Appeal be restored; and that the Appellants be allowed to prosecute the same to a hearing; provided nevertheless, and it is hereby further ordered, that such leave be subject to the several conditions mentioned in the said report, whereof the Judges of the Sudder Dewanny Adawlut, at *Fort William* in *Bengal*, for the time being, and all other persons whom it may concern, are to take notice and govern themselves accordingly."

The Appeal having been thus restored, came on now for hearing on the merits.

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Sir *Charles Wetherell*, Q. C., and Mr. *J. Stuart*, for the Appellants.

Sir *Charles Wetherell*:

The decision of this Appeal is to be guided by the same principles as if the lands in dispute were of English tenure, and the question between the Heir-at-Law and the Devisee. It must be determined on the abstract and general principles of Equity. The Hindoo and Provincial Court is a Court both of Law and Equity, governed by its own peculiar rules, I admit, but the principles of Equity, so far as the circumstances of this case are concerned, are the same as prevail in our Courts here. There are two questions; first, as to the point of the adoption; second, as to the validity of the compromise. The Provincial Court refused to enter upon the first question, and decided the cause wholly upon the ground of the agreement of compromise being a valid and subsisting agreement; they would not inquire into the question of title. The Sudder Court pursued the same course, notwithstanding that both that Court and the Provincial Court had deemed it requisite, in the first instance, to put the Defendants, *Sree Narain* and *Lullit Narain*, to the proof of their title, and to require the opinions of the Pundits upon their right of succession; but which they rejected as so much waste paper. Under these circumstances I shall reverse the order of these points, and inquire, in the first instance, what effect is to be given to the *Soluhnamah* under the circumstances in which it was executed. It must be borne in mind, that at the date of the Deed, *Bhya Jha* was a claimant for the whole of the estate, real and personal, of the *Ranee* and her late husband, the *Rajah*. He alleged

himself to have been constituted *Khurta Pootra* by the *Ranee*; a title which, if she was capable of conferring it, and it was created with proper solemnities, would be superior to all others. The present Appellants were the nearest heirs of the *Rajah;* they are descended in the seventh degree from a common ancestor; that is admitted, and was proved to the satisfaction of the Court; so that if no adoption had taken place, their title at least to the real estate would have been paramount. Now in these circumstances let us see what takes place. The property of the *Ranee* is in the possession of the Government. Notwithstanding all the allegations of *Bhya Jha* as to his having been solemnly adopted, and having performed the funeral rites, the Collector, who is on the spot, knows nothing about it, and seeing that there is about to be a general scramble for this lady's property, he applies for and obtains an order from the Government, authorising him to take possession of her estate and effects. In this state of things, there being Petitions from *Sree Narain* and *Lullit Narain* for possession on the ground of heirship, and counter-petitions from *Bhya Jha* on the ground of adoption, which were still pending, a Deed of Compromise, or, as it is termed, a *Soluhnamah*, was prepared and, with a counterpart Deed, executed by both parties. These instruments in form are like Deeds of the same nature in this country; their legal effect is precisely similar; they are of even date; that executed by *Bhya Jha* admits the heirship of *Sree Narain* and *Lullit Narain*, by descent; the other admits, or rather assumes, the adoption of *Bhya Jha*. Now these, I contend, are not such admissions as, if made in utter ignorance of the fact, from false and fraudulent repre-

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sentations, could be binding on the parties imposed upon. The admission of *Bhya Jha* that the other claimants were the legal heirs of the *Ranee*, could not bind any third person, or preclude a thousand claimants, if they could prove a higher title; the Court therefore called on them to prove their descent. Neither could the admission of the adoption of *Bhya Jha* be used to the prejudice of any other claimant by the same title. But the title of *Bhya Jha* was not proved; it stood alone upon the admission in the Deed of Compromise. Now it must be remembered that *Bhya Jha* was at this time a claimant for the whole property. If he was really *Khurta Pootra*, and his appointment a valid one, there was an end to any claim on the grounds of heirship by descent. His putting forward, therefore, such claim when he knew it unfounded in fact as well as law, was a blind to those claiming by descent, calculated to alarm and induce them to a compromise. That this was the object is apparent from the *Soluhnamah*; it states that the *Zemindary* was the property of the *Ranee*; that was contrary to the fact. It then states and proceeds upon the assumption of *Bhya Jha's* adoption being a valid adoption, and having been actually made, which again was contrary both to law and fact; and the real heirs, in opposition to their own undoubted claims, are made to recite and admit those statements as facts, and acknowledge the title of *Bhya Jha*, when in truth they neither did or could know anything about it, and the facts stated were in direct opposition to the truth. Now at the time he executed this instrument, *Bhya Jha* knew that his claim as *Khurta Pootra* was worth nothing. He, in the first place, knew that the *Ranee*

had no power to adopt; there is no evidence that the *Rajah* gave her any such authority, and without his authority she could not, by the law of the country, name a successor to his property. The alleged performance of the funeral rites by *Bhya Jha* was not true. It appears from the proceedings in the cause that they were performed by *Bhya Misser*, the *Mockhtar*, whose expenses on account of the funeral were allowed by Government. The representation made by *Bhya Misser* of the adoption was fraudulent. If he was cognizant of the fact of *Bhya Jha's* adoption, why did he, *Bhya Misser*, perform the funeral rites? If the fact of adoption was within the knowledge of *Bhya Jha*—"*supressio veri*" is "*suggestio falsi*"—it would be evidence of the legality of his claim; and therefore it is assumed and stated in the *Soluhnamah*, that he did perform the *Sraddh* of the *Ranee*. But such assertion was contrary to a fact; in ignorance of which the legal heirs were induced to release their rights. Of what avail would such a recital, made as this was, fraudulently, be in our Courts here? Even where there is no fraud, a Deed may be avoided here from ignorance, mistake, misapprehension, or improvidence. In *Broderick* v. *Broderick*,* a release given by the heir to a devisee, upon a representation that the Will was duly executed, which was contrary to the fact, was set aside. In *Pusey* v. *Desbouvrie*,† a freeman of *London*, by his Will, gave his daughter £16,000 upon condition that she should release her orphanage part, together with all her claim or right to his personal estate by virtue of the custom of the city of *London*, and made his son his executor. In compliance with this advice,

* 1 P. W. 239. † 3 P. W. 315.

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she executed a release; her orphanage share, it appeared, was much more than the legacy so substituted, and as she was not informed at the time of executing the release that she might elect, this omission was held by the Court to be so material as to avoid her release. The principle of that decision is precisely what we are contending for here. But the case of *Lansdown* v. *Lansdown** is in its circumstances still nearer; there, upon the death of a second brother, his eldest and youngest consulted a schoolmaster as to which of them had a right to the lands; the schoolmaster gave his opinion in favour of the youngest, whereupon they agreed to divide the estate; but the Court set aside the conveyance of the moiety as being given under a mistake. Also in *Gee* v. *Spencer*,† a release was set aside by reason of the misapprehension of the party. In *Evans* v. *Llewellyn*,‡ the conveyance was set aside merely on the ground that the parties were misinformed of their rights, though there was neither fraud or imposition practised. *Bingham* v. *Bingham*,§ *Cocking* v. *Pratt*,‖ are to the same effect. In *Leonard* v. *Leonard*,¶ it was established as a principle, by Lord *Manners*, after a most careful examination and comment on all the authorities, that a compromise of rights, doubtful in point of law, but founded upon a misrepresentation or suppression of facts in the knowledge of one of the parties only, cannot be supported, and a Deed of Compromise was set aside on that ground. The correctness of that decision has never been doubted. In *Gordon* v. *Gordon*,** Lord

* Mosely, 364; 2 Jac. & Wal. 205.
† 1 Vern. 31.
‡ 2 Bro. C. C. 150.
§ 1 Ves. Sen. 126.
‖ 1 Ves. Sen. 400, & 3 Ves. Sen. 176.
¶ 1 Ball & Beatie. 323.
** 3 Swan. 467.

Eldon says, "though family agreements are to be supported, where there is no fraud or mistake on either side, or none to which the other party is accessory, yet where there is mistake, though innocent, and the other party is accessory to it, this Court will interfere." All these authorities show the uniform principle upon which a Court of Equity acts in cases where there is mistake even without fraud; where that is an ingredient, the case is much stronger.

II. Upon what foundation does the alleged adoption rest? It is said to have been a verbal nuncupative adoption. In the first place, had the *Ranee* any power to appoint an *hæres factus?* By the Hindoo law, a widow who succeeds to her husband's property has no power to dispose of it;* nor can she adopt a son without the permission of her late husband;† nor can she alienate, either by gift or will, acquisitions made by means of the property devolved on her from her husband.‡ Now there is no proof of her authority to adopt here. But assuming she had the right, was it duly exercised? Of the twenty-six witnesses which *Bhya Jha* proposed to examine to prove his adoption, one only was produced, *Gujeraj Sing*; his evidence is worthless; it is mere hearsay. The impossibility of supporting his claim as *Khurta Pootra* seems to have struck *Bhya Jha* himself, for he suddenly changes his ground of claim, and insists on the Deed of Compromise. The Provincial Court take no notice of his failure of proof of the adoption (notwithstanding the suit was originally preferred by him in the character of alleged *Khurta Pootra*, and that the assumption of that title alone gave him a *locus standi* in Court), but

* 1 Mac. Hindoo Law, 33. † Ib. 175.

‡ Ib. 259; see also Sir T. Strange's Hindoo Law, 78-9.

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proceed upon the Deed of Compromise executed by *Lullit Narain* and *Sree Narain*, at the least in ignorance of their rights, if not upon the fraudulent representation of *Bhya Jha*. Upon that instrument, they award him a moiety of the property in question; and that decision is afterwards affirmed by the Sudder Court. Such a decision cannot be supported; it is against all principles both of equity and justice.

Mr. *Stuart*:

The whole question in this case is, was the Deed of Compromise fairly executed? If mistake or ignorance would avoid the Deed, far more will fraud practised by either party do so. Our title is, as the heirs at law; everything, therefore, done to conceal our title is a fraud upon us; and if an instrument is procured from us in ignorance of our rights, or under a mistaken apprehension of the rights of others, such instrument is invalid, and cannot be maintained in Equity. The third Judge, Mr. *Stuart*, admits the want of proof of the fact of adoption, and says (I quote from his printed judgment): "If we were now called upon to decide upon that fact, we should feel the greatest difficulty in determining upon which side the balance inclines; and should we even think that the evidence in the negative preponderates upon the whole, that surely would be no reason for setting aside the *Soluhnamah*." Now that is, I submit, bad law as well as bad reasoning. The proof of want of title of one party representing himself as *Khurta Pootra*, when in fact he was no such thing, would in every Court of Equity in the world, I apprehend, be a reason, and a most cogent one, for setting aside a Deed made on the faith of such a statement. But the Judge goes on to say: "An agreement

having been entered into with the utmost deliberation, one chief purpose of which was to prevent the necessity of litigating a particular fact, to rescind that agreement for fraud, upon the ground of very doubtful evidence against the fact in question, would be contrary to every principle with which I am acquainted. To consider the matter more generally, proof of fraud ought not to be derived from contradictory and nicely balanced evidence." Now without combating these principles, which I apprehend might easily be shown not to be consistent with the authorities here, it is sufficient answer to say that the second Judge has thrown entirely out of his consideration, the effect of ignorance or mistake, and proceeds upon the assumption that nothing but fraud, and that not proved from "contradictory and nicely balanced evidence," ever can avail to set aside an instrument of compromise. The cases already cited show how erroneous this doctrine is; and though I contend that the fraud practised by *Bhya Jha* was abundantly sufficient to rescind this agreement, yet the ignorance or misapprehension of their rights, under which *Sree Narain* and *Lullit Narain* laboured when they executed it, is enough to preclude their being held bound by it.

Mr. Serjeant *Spankie* and Mr. *Turton* for the Respondents.

Mr. Serjeant *Spankie*:

The principles derived from our Courts of Equity, regarding instruments executed in ignorance, mistake, or misapprehension of the rights of the parties, are not strictly applicable to this case. The *Soluhnamah* is not, as it has been assumed in the argument on the other side, an instrument declaratory of the rights, but

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of the claims of the parties; it is an agreement to compromise conflicting and doubtful interests, the grounds of which are stated as incidental and introductory to the proposed arrangement. It does not profess to investigate or decide, but to waive the decision of the strict rights of the parties, and to settle the amount each party is to receive, for the sake of certainty and peace. It is a "*transactio*," a dealing of its own particular nature in "*re dubia*," which stands precisely on the same footing as "*res judicata*," and according to the Civil Law, is in effect of equal force with a sentence or decree in which both parties have acquiesced.* This is very different from an agreement such as it is argued to be.

I. The parties are, if there is any ignorance, mutually ignorant. It is said that *Lullit Narain* and *Sree Narain* had proved their titles as heirs at law, but that was not so at the time the instrument was executed; they had petitioned the Court as such, and so had *Bhya Jha* as *Khurta Pootra*, but each party was in ignorance of the validity of the other's claim, and must have remained so until a legal decision was come to on the validity of those claims: it is clear that if they litigated their rights, one or other must fail, their claims being adverse. Then if no surprise was practised, what ground is there to impute fraud? The heirs at law, or those claiming as such, might commit fraud with the same facility as the *Khurta Pootra*. But what is the conduct of the parties? They deliberately execute this instrument in the presence of witnesses, and acknowledge it in open

* 1 Dig. B. II. Tit. 15. L. 1. Cod. B. II. Tit. 4. Varret's Prin. of Civil Law, vol. i. 171.

Court. They say, we have conflicting claims; we agree to settle them without further litigation; here is our Deed of Compromise; it is a voluntary act; we acknowledge and desire to be bound by it. Nothing can come more near to the "*transactio*" than this. Would a party levying a fine in the Court of Common Pleas, or a woman separately examined, be allowed to say afterwards, I was imposed on; though I knew the goodness of my own title, I did not know the badness of yours, and that ignorance entitles me to rescind and annul the proceedings? Such a thing was never heard of here. But it is contended that the principles of our Courts of Equity must be imported into this case, and that according to those principles this agreement cannot stand. The cases cited are where the title concealed was ascertained and had actual existence; in *Pusey* v. *Desbouvrie*, the party compromising her rights was ignorant of them; but they were valid and subsisting rights known to the other party, and not, as in this case, about to be the subject of contest. In *Gordon* v. *Gordon* there was concealment of a material fact, the legitimacy of the elder brother; yet Lord *Eldon's* remarks show that if both parties had been ignorant of that fact, the arrangement would not have been overturned. *Gee* v. *Spencer* cannot be relied on as an authority; the facts are not stated sufficiently to show the grounds of the decision. In *Naylor* v. *Winch*,* the Court held that it could not inquire into the adequacy or inadequacy of the consideration of a compromise fairly and deliberately made; the interests of the parties turned upon the construction to be given to the bequest of an annuity, and the Court observed, that, it being a question of doubt, it was

* 1 Sim. & Stu. 555.

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extremely reasonable that the parties should terminate their differences by dividing the stake between them. In *Leonard* v. *Leonard* there was concealment of a material fact. In *Stockley* v. *Stockley*,* Lord *Eldon* says that family compromises of doubtful rights are, if reasonable, to be favoured; and he adds, that in such arrangements the Court does not go the length of doing relief upon the principle that prevails between strangers. It is no reason for setting aside a release because the party releasing has a right; he must be ignorant of his right, or it must be concealed from him, *Cann* v. *Cann*.† All these authorities show the distinction between an agreement made in fraud of an ignorant or mistaken party's rights, and a "*transactio*" such as this.

II. The question of adoption cannot be decided upon this Appeal; it was not strictly litigated in the Court below; both the Provincial and the Sudder Courts proceeded on the *Soluhnamah*, and from the first proceedings, *Bhya Jha's* claim was directed to that instrument. That accounts for the non-production of twenty-six witnesses summoned by him. The Court felt that there was ground to infer his title sufficient to give him a *locus standi* and entitle him to compromise. That is sufficient for my argument; but I apprehend the circumstances go much further. There is no ground for supposing that the *Ranee* had not the power to make a *Khurta Pootra*; she had property distinct from her husband; that is in evidence; she was allowed to enjoy it during her husband's lifetime, and there is no evidence of his having made any disposition of it. Under such circumstances the natural inference is that

* 1 Ves. & Bea. 23–30. † 1 P. W. 727.

he gave her power over it; and if so, it would seem to follow as of course, that, in the absence of any evidence to contradict such intention, he should have given her power over his own as well as her estate; if so, the power to make a *Khurta Pootra* would follow as of course. But there is much doubt on this subject even among the Hindoo lawyers. In the *Mitácshara*,* the succession of women to their husband's property is shown to be allowed; the same doctrine appears from the *Dáya Bhága*;† and in the Digest,‡ the succession of females is treated of at large. From these authorities, as well as the evidence in the case, the right of the *Ranee* to make a *Khurta Pootra* seems undoubted; and Mr. *Stuart*, the Judge in the Court below, certainly assumes that power, and shows it to be consistent with Hindoo law and authority.

Mr. *Turton*:

To reverse the decision of the Provincial and Sudder Courts, this Court must be satisfied that the Judges below have miscarried in fact or law. The artificial rules of the Courts of Equity here cannot be applied to the native Courts of India. The general principles of Equity are, no doubt, the same all over the world, and to that extent the principles of the Court of Chancery may be said to apply to the Sudder or Provincial Court; but the practice contended for here is the application of a refined rule, arising from a state of morals and society, that has no existence in India. It is said this was an unrighteous bargain, because *Bhya Jha* knew at the time he made it he could not prove that he was *Khurta Pootra*; that was concealment

* Trans. by Colebrooke, p. 334. † Trans. by Colebrooke, p. 226.
‡ 3 Cole. Dig. 557.

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enough to vitiate the contract. Now supposing that on investigation of his title previous to the decision of the Court on it, he had discovered that there was a fatal objection to it, would that be a ground even here for annulling such an instrument of compromise made previous to such examination, and pending his claim? Clearly not. But what is his conduct? In fact, on the first opportunity that presented itself, he makes his claim; he petitions the Government, claiming to be *Khurta Pootra*; that act put his title in litigation, and until his plaint was rejected by the decision of the Court, it was a valid and subsisting claim, amply sufficient to give him a right to compromise if he thought fit. It is not enough to prove that without the adoption of *Bhya Jha*, *Sree Narain* and *Lullit Narain* would have been entitled as heirs at law; *Bhya Jha* must be shown to have conspired with his witnesses to prove a fraudulent title, such title being the ground of the compromise; this is inconsistent with all the evidence in the case. It is not necessary to enter upon the *Ranee's* right to make a *Khurta Pootra*; that may be, although I apprehend it is not, a disputed question; neither is it necessary for the purpose of this argument to go into the details of the adoption; the Court below declined very properly entering upon them; all that is sufficient is that *Bhya Jha* should be shown, at the time he executed the *Soluhnamah*, to have had a *locus standi* in Court; that is abundantly proved. The party impeaching a Deed, valid on the face of it, on the ground of fraud, must prove such fraud, *Field* v. *Sowle*;* and where there has been ample opportunity in the Court below to the party to tender such proof, if he neglect it this Court will not interfere, *Motee Lal Opudhiya* v.

* 4 Russ. 112.

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*Juggurnath Gurg.** In *Attwood* v. ————,† the Master of the Rolls (Lord *Gifford*) held that where a person, after due deliberation, had entered into an agreement for the purpose of compromising a claim made *bonâ fide*, to which he believed himself liable, and with the nature and extent of which he was fully acquainted, the compromise of such a claim was sufficient consideration for the agreement, and that a Court of Equity would compel specific performance, without inquiring whether he was in truth liable to the claim. The same principle was held in *Naylor* v. *Winch*.‡ I contend, therefore, that the Courts below were, even upon the refined principles of the Equity Courts here, amply justified in rejecting *Bhya Jha's* claim for the whole property on the ground now contended for; and it is enough for me to show that *Bhya Jha's* claim at the time the compromise was made was a *bonâ fide* claim as *Khurta Pootra*. It is not necessary to enter into an examination of the evidence on that subject; there is enough to satisfy the Court; but the Judges below proceeded on a different ground, and much of evidence we might have tendered was withdrawn by us. If that question is to be agitated, the case must go back to the Provincial Court.

Mr. Justice BOSANQUET:

9 May 1839.

The Appellants in this case represent *Sree Narain Rae*, who, with his brother *Lullit Narain Rae*, was co-heir at law in the seventh degree of *Inder Narain Rae*, late *Rajah* of the *Zemindary* of the *Pergunnah Havila Poorneah*, who died in the year 1784, leaving the

* 1 Moore's Indian App. Ca. 1.
† 1 Russ. 353.
‡ 1 Sim. & Stu. 555.

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Ranee Indrawuttee, his widow, in possession of his estate and effects.

On the death of the *Ranee*, on the 15th *November* 1803, the *Zemindary*, and all the estate of which she died possessed, were claimed by *Bhya Jha*, the son of her uncle, *Roodrudhut Jha*, who is represented by the Respondent, and who set up a title as *Khurta Pootra*, or heir by the adoption of the *Ranee*.

Bhya Jha burned the body of the *Ranee* on the evening of the day on which she died. He also performed the *Sraddh* or funeral ceremony, three days after the death, having in consequence of a petition preferred to the Zillah Judge obtained 5,000 rupees for that purpose.

Adverse claims having been preferred, the property was secured by authority of the Zillah Court, which, after having consulted the Sudder Dewanny Adawlut, put the heirs in possession upon giving security, leaving *Bhya Jha* to establish his right by adoption.

On the 11th of *December*, a *Soluhnamah*, or Deed of Compromise, was executed by the heirs-at-law and *Bhya Jha*, by which it was agreed that they should divide the whole of the property, moveable and immoveable, comprising the estate left by the late *Ranee*, as well the former *Zemindary*, as the *Zemindary* then recently acquired by private and public sale, in equal moieties. This instrument was executed in the presence of many witnesses.

On the 28th *December*, *Sree Narain Rae* and his brother, the co-heirs, as well as *Bhya Jha*, appeared before the Judge of the Zillah Court, when *Sree Narain* and his brother being asked why they executed the Deed when the right of no one had been inquired into, they replied, "We understood that the *Ranee* had

constituted *Bhya Jha* her *Khurta Pootra*, in which case he is also an heir, and he also understood us to be rightful heirs; wherefore we and *Bhya Jha* agreed to a mutual compromise, and have executed this engagement, which specifies also the objects." Being asked if they made this declaration in consequence of the oath set forth in the Deed of Compromise, or of their free will, they answered, " Our claim was for the entire estate; but since we have voluntarily entered into this engagement, we are satisfied and agree, of our free will, to relinquish a moiety of it."

Bhya Jha being also examined, said the late *Ranee* constituted me her *Khurta Pootra*; *Sree Narain* and *Lullit Narain* are kinsmen and rightful heirs of the *Ranee's* husband. They delivered a petition to the Court, claiming the entire estate left by the *Ranee*, and also preferred a claim to the whole. Wherefore, to prevent litigation, which might cause the ruin of both parties, we agreed to a compromise, and exchanged engagements accordingly. Being asked what he now claimed, he answered, I have now no claim beyond what is stated in the *Soluhnamah*. All of them, on being questioned if they wished to have joint possession of the estate, answered, We are desirous of having joint possession, and will hereafter carry into effect the stipulations of our reciprocal *Soluhnamahs*.

On the 30th *December* the Zillah Court pronounced an opinion that the agreement was manifestly collusive, and could not be sanctioned as valid; and further stated that the petitions of the parties having been sent to the Sudder Dewanny Adawlut, the instructions of that Court were, that the nearest of kin, who according to the *Shaster* should appear to be the legal heirs, should, on giving security, be put into pos-

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session of the estate, and that *Bhya Jha* should prosecute his claim by a regular civil suit. It was therefore ordered that he should prefer his claim by a regular suit, according to usage, and *Sree Narain* and *Lullit Narain* were put into possession.

Bhya Jha appealed from the decision of the Zillah Court to the Provincial Court of *Moorshedabad*. In consequence of petitions to the Sudder Dewanny Adawlut the parties appeared there. The co-heirs asserted that *Bhya Jha* was not the adopted son of the *Ranee*, and that they had been induced to sign the *Soluhnamah* by threats of *Bhya Jha*, *Bhya Ram Misser*, and others, and prayed that *Bhya Jha* might be required to prove that he was the adopted son of the *Ranee*, and might be directed to prosecute, according to the existing regulations, his claims to the property left by the *Ranee* at her decease.

On the 26th *September* 1804, the Sudder Dewanny Adawlut, after expressing strong doubts of the validity of the claim, declared that it was necessary for the ends of justice, that *Bhya Jha's* claim to the whole of the property of the late *Ranee* should be judicially investigated; and therefore ordered that *Bhya Jha*, whether he claimed the whole of the property of the *Ranee* in consequence of his having been adopted by her, or whether he laid claim to the half of it only, according to the agreement on the *Soluhnamah* with *Sree Narain* and others, should institute a suit for the purposes in the Court of *Zillah Poorneah*, in conformity to the Regulations.

A suit was accordingly instituted by *Bhya Jha*.

On the 3rd *September* 1806, the Court ordered the parties to produce all papers and documents, on which

they intended to rely, before the 4th *November* next following.

Bhya Jha contended that it was not necessary for him to prove that he had been appointed *Khurta Pootra*, inasmuch as the Defendant had admitted it by the *Soluhnamah*.

Witnesses named in a list were, nevertheless, directed by the Court to be examined. But on the 22nd *June* 1808, pursuant to a general order of the Government, all the proceedings were transferred to the Provincial Court of *Moorshedabad*.

On the 26th *June* 1809, *Bhya Jha* presented a petition, stating that he had two claims on the property, moveable and immoveable, left by the late *Ranee*.

That one claim was as *Khurta Pootra*. That the other claim was founded on the *Soluhnamah*, or Deed of Compromise. That the supplemental or annexed claim included two counts, first as *Khurta Pootra* for the whole estate, real and personal, amounting to sicca rupees 1,315,693; secondly, on the Deed of Compromise for a moiety of that sum; and that when the cause should come on for trial, he would bring forward or rely on either of these counts, as he might think proper.

On the 28th *July* 1809, after hearing one witness only, the Court of *Moorshedabad* proceeded to determine the case, and pronounced that it was unnecessary to enter into a further consideration of the claims of either party; observing, that whether *Sree Narain* and *Lullit Narain* were the rightful heirs, or *Bhya Jha* was or was not *Khurta Pootra*, they were equally bound by the stipulations of the engagement, mutually interchanged; and the *Soluhnamah* executed before the

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Judge defined the rights of either party. It was therefore ordered that *Sree Narain* and *Lullit Narain* should give to *Bhya Jha* possession of one moiety of the property, and one half of the profits received, and each party should pay his own costs.

From this decision *Sree Narain* and *Lullit Narain* appealed to the Sudder Dewanny Adawlut.

An objection was made there to the right of *Bhya Jha* to enforce his claim under the *Soluhnamah*, after having, by a petition to the Zillah Court, 5th of *September* 1805, claimed the entire property, and by a letter of the 10th of *September* 1806, declared that if *Sree Narain* and *Lullit Narain* would not abide by the stipulations contained in it, he, *Bhya Jha*, would henceforth consider the same null and void.

The Court ordered an investigation to be made upon two points: first, as to the facts of *Bhya Jha's* adoption by the *Ranee*; and secondly, the alleged fraud of *Bhya Jha*, *Bhya Ram Misser*, and others, in obtaining the *Soluhnamah*. In consequence of this Order, a great body of evidence was given on both sides, and the Sudder Dewanny Court, after very full consideration of the whole case, by their final decree of the 27th of *July* 1812, confirmed the decree passed by the Provincial Court of *Moorshedabad* of the 28th of *July* 1809, which ordered *Bhya Jha* to be put in possession of a moiety of the contested property, and also half of the produce arising therefrom since the time that *Sree Narain* and *Lullit Narain* had had possession; and moreover declared that *Bhya Jha* was entitled to a moiety of the entire property left by the *Ranee*, specified in the petition of the Plaintiff in the cause which the Provincial Court, in their Decree, had ordered to be placed in deposit. But as the objection

of the Appellants to the *Soluhnamah*, on which the Decree of the Provincial Court was founded, were not thoroughly inquired into, on which account the Appeal to the Sudder Dewanny Adawlut was not without foundation, it was ordered that both parties should be answerable for the costs of suit in that Court.

The first question to be determined was whether *Bhya Jha* was precluded from insisting upon the *Soluhnamah*.

The Court, considering that *Bhya Jha* was not the first to swerve from the reciprocal agreement entered into between him and his opponents, but on the contrary, had uniformly expressed his willingness to carry the same into effect, even after his opponents had retracted their consent, and until the order of the 26th of *September* 1804, which directed a judicial investigation into his claim to the property of the *Ranee*, that he preferred his claim upon the agreement before the cause had come to a hearing in the Provincial Court, and that he had acquiesced in the Decree of that Court, maintaining the agreement, and praying that it might be affirmed; and did not apply for any examination of witnesses to support his title to the whole estate, but on the contrary objected to such examination when ordered by the Court, and desired a confirmation of the Judgment for half the estate, in conformity with the Deed of Compromise; and moreover considering that forms of pleading were not very strictly observed in the native Courts;—determined, and, as their Lordships think, rightly determined upon the grounds above mentioned, that *Bhya Jha* was at liberty to insist upon the validity of the *Soluhnamah* in support of the judgment of the Provincial Court of *Moorshedabad*.

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The next question to be considered, was, whether that instrument ought to be supported by the Court, or whether it was not impeachable on legal or equitable grounds.

The first ground of objection was, that it had been obtained by the fraudulent representation of a transaction which was absolutely false, namely, that the *Ranee* by words addressed personally to *Bhya Jha* on the morning of her death, had constituted him her *Khurta Pootra* or adopted heir.

If this were clearly proved to be untrue, it must necessarily have been untrue within the knowledge of *Bhya Jha* himself; and any deed of compromise founded on an assertion of such matter by him, however deliberately entered into by the co-heirs-at-law, would unquestionably be invalid.

The Judges of the Sudder Dewanny Adawlut, after carefully reviewing all the evidence in the cause, did not feel themselves able satisfactorily to declare that the adoption had taken place, neither did they feel themselves justified in pronouncing that the representation of its having taken place was false.

Without satisfactorily establishing the former, *Bhya Jha* could not be entitled to recover the whole estate. But when after the assertion of his title on the one side and the denial of it on the other, a compromise was entered into, in the presence of many witnesses, by parties on the spot, and solemnly acknowledged by the parties in a court of law to have been voluntarily executed, the burthen of showing that it had been fraudulently obtained by false representation was cast upon those who sought to impeach the validity of their own deed.

The laborious and accurate examination which the

testimony in this case has undergone at the bar has greatly assisted their Lordships in determining whether the Sudder Dewanny Adawlut arrived at a just conclusion.

They find a great body of positive evidence to the fact of adoption, given by persons who swear to having been present at the time when the *Ranee*, being of sound mind, addressed *Bhya Jha*, saying, "When I was but five or six months old my mother died, and a short time after, my father died; and ever since your father maintained me, and having brought me to this *Rajah*, gave me in marriage; I am therefore greatly indebted to your father, and thereby you have claims on me; I have made you my *Khurta Pootra*, property, estate, and effects, which I have bequeathed to you; after which words *Bhya Jha* rose and thankfully accepted them." These witnesses further swear that she told *Bhya Jha* to burn her body and perform the *Sraddh*; others swear that, in their hearing, the *Ranee* personally declared on the same morning that she had actually made *Bhya Jha* her *Khurta Pootra*, and gave her reasons; and others depose that she had on that same morning consulted them as to the proper hour for making a *Khurta Pootra*. It is beyond all dispute that *Bhya Jha* almost immediately after the death of the *Ranee* burnt her body, an office which it belonged to *Khurta Pootra* to perform; that his right to succeed as *Khurta Pootra* was claimed for him by a petition presented the next day, and that he also publicly performed the ceremony of the *Sraddh* three days after the death, as the adopted heir, on which occasion he was placed on the *Musnud*,* and the turban put

* The cushion or chair of state in which a *Rajah* or *Zemindar* sits in public.

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upon his head. On the other hand it is sworn by many witnesses who profess to have been in attendance on the *Ranee* on that day, that she did not make any *Khurta Pootra*; that she was incapable from extreme illness and insensibility from doing any such act; that several of the persons who swear to having witnessed the act were not present at the time; that *Bhya Jha* himself was absent from the house during that morning, and did not arrive till after the death of the *Ranee*; that he was at another place at the time when the adoption is sworn to have taken place; and that he had, for a long time before, ceased to come into her presence, in consequence of her having been displeased with him on account of his having practised sorcery against her. Declarations of witnesses on both sides, contrary to the facts deposed to by them in evidence, are sworn to by others; and tampering with the witnesses by the opponents on both sides is deposed to.

It cannot be denied, therefore, that circumstances are stated upon the face of the evidence which are calculated to excite suspicion, both with respect to the fact of the adoption, and the credit of several witnesses adduced to prove it.

But the case of the Appellants is founded upon a charge of positive fraud and imposition, and gross fraud is not to be imputed upon suspicion only. Unless the charge be proved, parties are not to be released from agreements entered into by their solemn acts. There may be ground to pause in giving full credit to the alleged adoption; but their Lordships, upon a review of the testimony given on one side and the other, regard being had both to the matter and the credibility of such testimony, do not see such a

preponderating weight of evidence against the fact of adoption as to justify a determination that the assertion of its existence was an utter falsehood, and they are therefore of opinion that the ground of impeaching the *Soluhnamah* by the co-heirs, on account of its being founded on a *suggestio falsi* by his opponent, *Bhya Jha*, has not been maintained.

The next objection to the *Soluhnamah* is an alleged *suppressio veri.*

But the evidence does not afford any foundation for that objection. If the imputed falsehood of the adoption be laid out of the case for want of sufficient proof to support that imputation, the parties, in respect of the knowledge of circumstances, must be considered to stand upon equal terms. They belonged to the same caste, they lived in the neighbourhood of the *Ranee* at the time of her death; they had the opportunity of making inquiry into all material facts, and their attention was alive to the grounds of claim to the property; these grounds having been made the subject of assertion on the one side and denial on the other, before the execution of the deed. It does not appear that *Bhya Jha* was in any respect better informed with respect to the rights of the heirs, the bearing of the law upon their rights or his own, or the nature or amount of the property, real and personal, than the heirs themselves, still less that anything was concealed which they might not be supposed to know as well as he.

The ground, however, which is most strongly relied upon, and to which a great part of the evidence is addressed, is that the heirs were induced to execute the *Soluhnamah* by intimidation and undue persuasion.

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The person alleged to have been most active in this respect is *Bhya Ram Misser*, the *Mokhtar* or manager of the late *Ranee*, who is said to have urged the heirs to enter into the compromise, by repeated importunities, by the representation of the injury which they must necessarily sustain by a long protracted litigation, which would prevent both them and their children from deriving any benefit from the *Zemindary*, and by actual threats that he would cause the ruin of it, and had the means of carrying such threats into effect.

Other persons, and among them the Collector of the East India Company, are stated to have used persuasion to the same effect as *Bhya Ram Misser*; but it is to be observed, that the charge of having employed intimidation is confined to the latter; and that as he was dead at the time when witnesses in support of the charge were examined, the opportunity of confronting them by his evidence was known by the witnesses to be lost. At what precise time *Bhya Ram Misser* died, does not appear. In the examination of *Doorgapersaud*, however, on the 16th of *April* 1811, it does appear that he was then dead; and it was not till after that day, that the examinations were taken of the witnesses who charge *Bhya Ram Misser* with having employed threats.

The advice to enter into a compromise rather than engage in litigation, subject to be protracted by Appeal, not only to the Sudder Dewanny Adawlut, but to *England*, could not, in the absence of fraudulent intention, be deemed a ground for impeaching the validity of the *Soluhnamah*. Indeed, *Doorgapersaud* himself, the *Vakeel* of *Sree Narain Rae*, states in his evidence, that he concurred in persuading his client,

upon the same grounds, to accede to the compromise; and his evidence with respect to fraud, in causing the *Soluhnamah* to be executed, is confined to the persuasion and advice in which he himself concurred.

The allegation of compulsion, by the threats of *Bhya Ram Misser*, brought forward in evidence after his death, cannot countervail the solemn and unequivocal declaration made by the heirs to the Judge of the Court, that they had voluntarily entered into the engagement, that they were satisfied, and had agreed of their free will to relinquish a moiety of the property, more especially when it is recollected, that they were not taken by surprise, having, according to their own evidence, executed the instrument after the respective claims of the parties had been the subject of dispute.

The last ground of objection is, that the heirs have given up a moiety of their undoubted right, under a palpable mistake, of which it is contrary to the principles of equity that *Bhya Jha* should be allowed to take advantage.

To judge properly of this objection, we must look at the circumstances as they stood at the time when the *Soluhnamah* was executed. The Appellants are not entitled to avail themselves of all the light which subsequent investigation in the course of the suit has thrown upon their claims. If the nature or the extent of the rights of the respective parties could be considered as the fair subject of doubt at the date of the deed, and if, to avoid expense and delay by legal inquiry, they agreed to settle the contest by an amicable arrangement, such transaction is not to be disturbed on the ground of the inequality of benefit

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which either party may eventually have received from it.

It has ultimately been ascertained that the *Ranee*, without the authority of the *Rajah*, her husband, was not entitled to make an adopted heir to her husband's *Zemindary*. But at the date of the *Soluhnamah*, even this point does not seem to have been taken as clearly understood. *Sree Narain Rae* and his brother were related to the late *Rajah* in the seventh degree; and *Bhya Jha* was her cousin, the son of her uncle; and not only do they in the *Soluhnamah* say, if *Bhya Jha* was *Khurta Pootra* he was also an heir; but the Judge of the Zillah Court says, if *Bhya Jha* was really *Khurta Pootra*, he would be entitled by the *Shaster* to the whole estate, real and personal. It appears further, that besides the *Zemindary* of the *Rajah*, the *Ranee* died possessed of very large *Zemindary* property, part of which had been purchased during a long widowhood of nineteen years. Whether any, and what part of such *Zemindary* property had been given to her by her husband, whether any, or what part of it was purchased with the profits of her husband's *Zemindary*, or any, and what part with her own property, is quite unascertained. Further it appears that she died possessed of more than three lacs of rupees in personal effects, or nearly £30,000. That she was entitled to dispose of her separate property or *Streedhun*, consisting of whatever was given to her by her husband, or her husband's family, or any part of her own family, whether moveable or immoveable, by adopting an heir of her own, appears to have been sufficiently established; whether she was authorized to dispose of landed property, purchased with the profits of her husband's *Zemindary*, and remaining in

her possession at her death, became a subject of discussion in the Sudder Dewanny Adawlut; the result of which discussion appears to have been unfavourable to her right; but it could not by any means be treated from the commencement of the adverse claims as a matter free from doubt; for Mr. *Harrington*, in his minute with reference to the final judgment of the Sudder Dewanny Adawlut, though he expresses his concurrence in the result above mentioned, and refers to the *Bewustas* of the *Pundits* in support of it, remarks that it is not clearly decided by the authority of works of the *Mitheela* school, to which this family belonged, whether any moveable property, inherited by a widow from her husband, and in her possession at the time of her death, or any money or other property arising from the product of the landed estate, during her possession, devolves, on her death, to her own heir or to the heir of her husband.

Under all these circumstances, the true amount of the relative rights of the litigant parties must be considered as having been doubtful, whether the law or the fact be regarded. The uncertain event of the legal part of the case may be inferred from what is contained in the minute of Mr. *Harrington* above referred to. And it is justly observed by Mr. *Stuart*, the other Judge, that even after all the inquiry which had taken place, the rights of the parties, as they depended on facts, remained so doubtful, that they would even then afford a fair and equitable basis for a compromise.

Upon the whole, therefore, their Lordships are of opinion, that the Appellants have failed to establish that the execution of the *Soluhnamah* was obtained by fraudulent misrepresentation, or concealment, or the execution of it compelled by fear, or that the agree-

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ment at the time when it was entered into was not a fair subject of compromise of disputed and doubtful rights: and, consequently, that the Decree of the Sudder Dewanny Adawlut ought to be affirmed.

That Court, though it affirmed the Decree of the Provincial Court, did not give the costs of the Appeal, because a full opportunity of investigating the case in the Court below had not been allowed. But a very full investigation of the case took place in the Sudder Dewanny Adawlut. From the Decree of that Court an Appeal was made to the King in Council, and in consequence of the Appellants having omitted to appeal, the case was heard *ex parte*, and the Decree affirmed. The Appellants upon a special application to His Majesty in Council were allowed to restore the Appeal, and bring on the case for hearing, their Lordships being of opinion, that instead of affirming the Decree, they ought to have dismissed the Appeal. The case has now been fully considered, and the Judgment being in favour of the Respondent, affirming the determination of two Courts in *India*, as well as the former determination here, their Lordships are of opinion that the costs of the Appeal ought to be paid by the Appellants.

RAJUNDER NARAIN RAE and MOHAINDER NARAIN RAE, the two surviving sons and representatives of SREE NARAIN RAE, deceased - - - - - } *Appellants,*

v.

BIJAI GOVIND SING, son and representative of BHYA JHA, deceased - - } *Respondent.**

On Appeal from the Sudder Dewanny Adawlut of Bengal.

29th June & 5th July 1839.

THE question raised upon this Appeal respected the *Wasilaut* or mesne profits of the *Zemindary* of *Havila Poorneah*, the subject of the previous case, and the mode in which the accounts were directed to be taken by the Decree giving possession.

By the Decree of the Sudder Dewanny Adawlut, bearing date the 27th of *July* 1812, confirming the decision of the Provincial Court of the 28th of *July* 1809, the *Soluhnamah* was declared valid, and ordered to be enforced.

After the admission of the Appeal from these De-

The admission and consent of a *Vakeel* made with due authority, will bind his client, though not present at the time of making it. Where therefore an order was made for the payment of a certain sum, being the moiety of the profits of an estate founded on the amount for which security had been taken as the rental of the *Zemindary* when possession was given up, and that amount was admitted and assented to by the *Vakeel* in Court, and the order made accordingly,—held by the Judicial Committee, affirming the judgment of the Court below, that such consent was binding on the client, and precluded him from afterwards opening the account.

Interest at the rate of one per cent. per mensem, to be calculated at the end of each year, does not mean compound interest, so as to admit of interest being charged upon the rests, but interest calculated per mensem, but payable per annum.

* Present: Lord Brougham, Mr. Justice Bosanquet, Mr. Justice Erskine, and the Right Honourable Dr. Lushington.

Privy Councillors,—*Assessors*, Sir Edward Hyde East, Bart., and Sir Alexander Johnston, Knt.

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crees by *Sree Narain Rae* to the King in Council, the Sudder Adawlut, on the 16th of *November* 1812, ordered that the Zillah Court, before giving effect to the Decree, should require *Bhya Jha* to give security before he was let into possession of the moiety of the *Zemindary*. This was accordingly done, and he entered into possession of his moiety of the *Zemindary*.

On the 18th of *December* 1819, an order was made by the Court, by which it was ordered, that the *Sarrishtardar* and *Peishkar* (or record-keeper and accountant) of the Court should make an account of what the Respondent had to receive with reference to one moiety or portion of the same, of 1,12,740 rupees per annum, taking it from the commencement of the Appellants' entry into the possession of the *Zemindary*, to the end of the *Moolki* year 1215, (1809 A. D.,) with interest on the said amount, making the calculation at the end of each year up to the date of the Decree of the Provincial Court, and that having cast up together the principal and interest of the profits up to the date of the Decree given by the Provincial Court, they should calculate upon the whole amount, interest, at the rate of 1 rupee per centum per mensem, up to the date of the Decree of the Sudder Dewanny Adawlut.

It appeared, that the *Vakeel* for the Appellant had, on the case coming again before the Court, agreed in the name of his client to the sum calculated as the mense profits of the *Zemindary*, though he at the same time objected to the rate of interest.

The accounts were made out on the principle directed by this order.

By an order made on the 23rd of *December* 1819, in compliance with the prayer of a Petition to that

purport, the Court ordered and declared, that the Respondent was entitled to receive interest on the money lodged with the sureties for the first year. And on the day following, in the same month, the Court further ordered the Respondent to be paid rupees 15,469, 2 anas, 6 gundas, 1 cowrie, being interest on 1,13,745 rupees, 8 anas and 10 gundas, half of 2,27,491 rupees, 1 ana.

On the 3rd of *January* 1820, the Court ordered the Appellants to pay the *Vakeel* double fees.

Sree Narain Rae, on the 22nd of *March* of the same year, presented a petition complaining of the manner in which the *Wasilaut* account had been taken, and the several orders already referred to: these objections were however overruled, and the Court rejected the Petition.

From these several orders the Appellants appealed to His Majesty in Council.

Sir *Charles Wetherell*, Q. C., and Mr. *J. Stuart*, for the Appellants.

The sum the Appellants have been called upon to pay is calculated on an hypothetical account of the mesne profits of the *Zemindary*: the Court below, instead of ascertaining or having an account taken of the amount of rents and profits actually received, in respect of the *Zemindary*, has charged the Appellants with the amount for which security had been given when their ancestor, *Sree Narain Rae*, was let into possession, which was a mere estimated amount, and there is no evidence that the actual produce was so great: the Court has charged the Appellants with interest on that sum.

There is no agreement which binds the Appellants

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to pay the amount thus calculated: they have not bound themselves to more than they would here in *England*: in a Court of Equity here, they could not have been called upon to account for more than such sums as they might have with due diligence received, all just allowances being made, according to the circumstances of the case. But the Court will not Decree the payment of the sums received by the parties in possession unless the rental is ascertained. it cannot be said that the acquiescence of the *Vakeel* to the *Wasilaut* is binding on the Appellants: if an attorney here admits a rental by mistake, the Court will correct it. *Moseley's* case.* An agreement of this kind is of so unusual and extraordinary character, as to bind a man to admit, as the basis, a certain amount of rent, that this Court will look with suspicion into the agreement, whether there is a different practice from ours in *India* or not. Such an agreement here, by a solicitor, would not be upheld for a single moment; it is too improvident; there is a great difference in this from an agreement in taking an account in the Masters' Office. It is clear, in this case, it cannot be binding; the acquiescence of the *Vakeel* to the *Wasilaut* was not within the scope of his authority, and therefore null.

The next objection the Appellants raise is to the rate of interest: the Court below has allowed interest upon interest, or compound interest; the Appellants have been charged with compound interest to an enormous amount, contrary to the principle established by the authorities as to the mode of taking accounts of mesne profits; they have been charged with interest on

* Cited in *Cecil* v. *Salisbury*, 2 Vern. R. 224.

sums which were not in the hands of *Sree Narain Rae*, their ancestor, or in any manner employed for his use, but had been paid into Court, and were actually in the hands of the Court during the period for which interest is charged.

By the order of the 3rd of *January* 1820, the Appellants are charged with double fees to the *Vakeels* employed in the case: this was totally uncalled for, and very oppressive on them, and we trust your Lordships will give relief on all the points urged on behalf of the Appellants.

Mr. Serjeant *Spankie* and Mr. *Stinton* for the Respondents.

With respect to the point now raised for the first time by the Appellants, to the calculated amount of the mesne profits of the *Zemindary*, it is clear this Court will not interfere. An admission made by the *Vakeel* of the Appellants to the *Wasilaut* is binding on his client, and cannot afterwards be impeached. The *Vakeel* may have exceeded his authority as to what he admitted, but his evidence would not enure as an admission. It is a clear principle, recognized in Courts of Equity, that consent by counsel in Court is binding on his client, even if he had no instructions to consent. *Furnival* v. *Bogle*.* If a counsel considers himself authorized, and consents, the Court will act upon it, and his client is bound by it. *Mole* v. *Smith*.†

The question of interest cannot now be raised: it was allowed by the two Native Courts in *India*, under the authority of the *Bengal* Regulation XIII of 1796, and their concurrent decisions have been confirmed by

* 4 Russ. 142. † 1 Jac. and Wal. 663.

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your Lordships in Council: it is obvious, therefore, the question cannot be again opened.

The allowance of double fees to the *Vakeels* engaged in the cause was in the discretion of the Court below, and ought not to be questioned.

Lord BROUGHAM:

5th July.

The first question for their Lordships' consideration is, as to the manner of taking the accounts, and whether the liability to pay according to a certain scale was admitted in a competent manner. The Appellants' *Vakeel* is examined, and we find in his evidence, that he admitted the amount stated for principal, but objected only to the interest. He states as follows: "Under these circumstances, I observed that before then, often had mention been made before Mr. *John Herbert Harrington*, the former Chief Justice of the Court, of a settlement of the *Wasilaut* accounts, but the Respondent's *Mokhtar* always said that he would elicit the *Wasilaut* on the gross collections, and the Appellant always objected, by saying that a *Wasilaut* could not be made item by item, because the estate had been given out in farm, and that by such farming out, the sum of 1,12,740 rupees, 7 anas, being profits, was forthcoming with the sureties on account of four years, after paying the public revenues. That from the year 1216 to 1219, deposits had been made at the above rate. That how could he account to Respondents item by item, and strike a balance: in fact, the Appellant has set forth this plea in his petitions, which are in existence among the records. Hence when the said Third Judge made the suggestion upon the ground that the said amount had been deposited in the treasury, it was not equitable that the Appellant should

oppose objections to the measure, on which account I admitted it. No letter came to me from *Rajah Sreé Narain Rae*, giving instructions for our admission of the *Wasilaut*, nor did the Appellant's *Mokhtarkar* object to it, but merely objected to the interest. My colleague, *Suddanund Pundit*, also objected to the interest. After this, *Shykh Fyazat*, Appellant's *Mokhtarkar*, brought a petition for the purpose of its being laid before the Court, bearing the Appellant's seal. I do not know whether at that time *Suddanund Pundit* was in attendance in Court or not, but I filed the petition, putting to it merely my signature. In this *Sree Narain Rae* made no objection to the sum of 1,12,740 rupees, 7 anas, but he objected to the interest and to the paying over the *Wasilaut* amount to the Respondent, although good and sufficient security had been taken. At length the Judge of the Court fixed the interest at twelve anas per cent. The petition which has now been presented to the Court, containing objections to the *Wasilaut*, is in opposition to the *Durkhast*, which was presented on the 3rd of *January* of the present year." That petition was not produced, and doubts as to the evidence of the *Vakeel* have been thrown out in argument, with respect to the sums for which he consented to be charged. It appears upon principle to be correct, otherwise it would not be safe to see any agent or counsel, without letting the parties themselves appear in the most trifling matter. The Court must in all such cases see the parties themselves, if they are not to be bound by their agents. The *Vakeel* here set up another scale, and we do not state it was our opinion that a case might not be made out, that the admission of the *Vakeel* was not made with due authority; but here there was no reason to doubt that

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he had the authority of his client. We have not the petition, but we have the statement of the party filing it. Upon the whole, we are of opinion that there is no ground for disputing the accuracy of the Judgment of the Court below upon the first point.

The next question is, whether, looking at all the accounts, the sum of 1,12,740 rupees is not to be taken as the net profits, in contradistinction to the gross profits. Upon that point it is unnecessary to say more than that this Court does not see any reason for altering the decision.

The next point is with respect to the double fees stated to be paid to the *Vakeels* employed in the case: their Lordships do not see any ground for altering the decision of the Court below in that respect. It is a charge which the Court would be disposed to support rather than to alter, for this reason, that it could not be made the sole and substantive ground of appeal itself, because it comes under the head of costs: undoubtedly, if there is a good ground of appeal independently of that point, the Court will take it into consideration; it is part of the costs of defending the title in fact. The only question that remains to be disposed of, is respecting the compound interest; and here their Lordships do not entertain the same opinion as the Court below. First it is said by the Respondent that this was disposed of by the Court in *India*, confirmed by the irreversible decision of the King in Council. But when we look at the words, what is the interest? It is "interest at the rate of 12 per cent. per annum." We do not think that the Court has any ground for maintaining that there was a right to charge interest upon the Respondents, and it comes simply to this: in this country interest is paid half-yearly or

yearly, but in *India* it is customary to pay the interest at the end of each month, at the rate of one per cent. per month, and the words might mean to exclude what is otherwise generally meant, the payment of interest monthly: the Court decrees the payment yearly.

With respect to the *Bengal* Regulation XIII of 1796, their Lordships think that this case does not come within it. This is an Appeal from the Zillah to the Sudder Dewanny Court: whereas the Regulation XIII of 1796 is to prevent litigious appeals from the Zillah to the Provincial Court, but only litigious appeals. Now this certainly was not so considered by the Court, and if it should be said that they had a right, by way of fine, to give compound interest, or by way of costs, it is quite clear that is not the right construction; for if the Court meant to avail itself of the power of the Regulation, it would do it in the words of the Regulation, and it would be a Decree for compound interest, and not as imposing a fine or mulct. Their Lordships do not think upon either of these grounds the order of the Court below is right. The question is not between the payment of interest between 1804 and 1809—that is disposed of finally by the Decree now affirmed; nor is it a question with respect to the payment between 1809 and 1812—that is part of the same Decree. But the question is, as to the accumulating interest between 1809 and 1812, which is interest upon interest. The sum set forth, 10,360 rupees, is simple interest upon 15,501 rupees, from 1804 to 1809, and that not being disputed, that 10,360 rupees is made principal, and ordered by the Court to bear interest from 1809 to 1812. That is the only matter in dispute, whether that which is interest from 1804 to 1809 shall bear interest from 1809 to 1812. We do not understand that there is

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any dispute about the interest between 1804 and 1809. The ground of the Decree of 1819 is, that there was interest given on capital from 1804 to 1809, upon which they proceed to operate and give compound interest, that is to say, to make a rest at 1809, and give interest from 1809 to 1812.

Their Lordships understand that the difference between the parties, as stated at the Bar, is this, though it has not been argued precisely in this form; that true it is that the Appellants were bound to pay simple interest from 1804 to 1809 upon 15,000 rupees, carrying on the first interest from 1804 to 1809; that from 1809 to 1812 they are not bound to pay compound interest upon the prior sums, that is to say, they are not bound to pay simple interest upon the 10,360 rupees, the whole amount of the sum due. Now, for the reasons I have stated, as well as the forms in Regulation XIII of 1796, the amount of 1812 and 1819 being *res judicata*, the only ground that could have entitled the Court below, in the Decree of *December* 1819, to have made a rest, would have been the conduct of the parties; but their Lordships, not finding there is any such ground, and not being at all aware of any reason why they should lean in this case to compound interest in the shape of rests, are of opinion, as far as this goes, that the decision of the Court below must be reversed,—the consequence of which will be, that interest down to 1812 must be allowed from the end of each year simply upon the capital or principal, without any interest being added at the beginning of each year. All will be allowed down to the date of the Decree of the 27th of *July* 1812, cutting off all that accumulation and all the difference between simple interest upon the original sum and compound interest.

With this alteration, the Decree of the Court below will be in all other particulars affirmed, both as to the costs and as to the main ground of the Appeal; and as there is a sufficient difference between the Decree below and the Decree here, it will be affirmed without costs.

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JAMES CLARK, Assignee of THOMAS SHEPHERD, a Bankrupt - - - } *Appellant*,

v.

BABOO ROUPLAUL MULLICK - - - *Respondent.*

AND BY REVIVOR, BETWEEN

The said JAMES CLARK - - - - - *Appellant*,

v.

SREE MUTTY DOORGAMONEY DOSSEE, Executrix; and PRAWNKISSEN MULLICK, and SREEKISSEN MULLICK, Executors of BABOO ROUPLAUL MULLICK, deceased - - - } *Respondents.**

On Appeal from the Supreme Court at Fort William in Bengal.

5 July 1839. 9 & 11 Dec. 1840.

Assumpsit by the surviving Assignee of a Bankrupt, under an English Commission, against a

BABOO ROUPLAUL MULLICH, a native Merchant, resident at *Calcutta*, within the jurisdiction of the

debtor, a native of *India*, and resident within the jurisdiction of the Supreme Court of *Calcutta*. Plea: That the Defendant had not under-

* Present: Members of the *Judicial Committee*,—Lord Brougham, Mr. Justice Bosanquet, Mr. Justice Erskine, and the Right Hon. Dr. Lushington.

Privy Councillors,—*Assessors*, Sir Edward Hyde East, Bart., and Sir Alexander Johnston, Knt.

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Supreme Court, on the 31st of *May* 1825, made five promissory notes in favour of *Thomas Shepherd*, each for the sum of 3,812 sicca rupees, 12 anas, with interest at 3 per cent., and payable at three, four, five, six and seven years after their respective dates.

On the 4th of *July* 1826, a Commission of Bankruptcy, under the Great Seal of *Great Britain*, was issued against *Shepherd*, under which he was duly declared a bankrupt; and *Andrew John Nash* and *Thomas Wyatt* were chosen Assignees of his estate and effects, the usual assignment being executed to them by the Commissioners.

taken or promised in the manner or form as the Plaintiff, *Assignee as aforesaid*, had complained against him. Two days after issue joined the Defendant gave notice that he intended to dispute the trading, petitioning creditor's debt, and bankruptcy. At the trial, copies of the proceedings in the Bankruptcy Court, the Commission, Adjudication and Assignment to the Plaintiff, and his co-assignee, which purported to be certified by the Clerk of the Enrolments, and to be under the seal of the Court of Bankruptcy in *England*, pursuant to the 2nd & 3rd *Will.* IV., c. 114, s. 9, were given in evidence; but no proof was given that these copies were authentic, nor was the seal proved to be that of the Court of Bankruptcy in *England*. A verdict was given for the Plaintiff, liberty being reserved for the Defendant to move for a nonsuit. A rule *nisi* was afterwards granted, and after argument made absolute, and the verdict set aside, and Judgment of nonsuit entered for the Defendant, on the grounds that there was no evidence of an Act of Bankruptcy, of trading subsequent to the passing of the 6th *Geo.* IV., c. 16, and that neither that Act, nor the 2nd & 3rd *Will.* IV., c. 114, extended to *India*:—held on Appeal affirming the Judgment of the Court below,—

1. That the plea of *non assumpsit* put the Bankruptcy and Assignment at issue sufficiently without any notice.

2. That the form of the plea "*Assignee as aforesaid*" was not an admission of the Plaintiff's title as Assignee of the Bankrupt, but only used in reference to the description the Plaintiff had given of himself in the declaration.

3. That the Statutes 6th *Geo.* IV., c. 16, and the 2nd & 3rd *Will.* IV., c. 114, made to facilitate the proof of Bankruptcy and Assignment in *England*, did not extend to the Courts in *India*, and that in those Courts such evidence of the Bankruptcy must be given, as would have been required to prove the fact if no Statutory regulations had been made.

Where, by the custom in *India*, the Respondent (being a Hindoo woman of rank) could not be personally served with an Order of Revivor, the Judicial Committee allowed service to be substituted on her *Dewan* or chief servant.

On the 18th of *January* 1829, *Nash* died, leaving *Wyatt*, his co-assignee, surviving; and on the 23rd of *March*, in the same year, *Wyatt*, as such surviving assignee, sent out a power of attorney to his agents, *William Bruce*, *John Allen*, and *Henry Thomas Poode*, authorizing them to obtain possession of the five promissory notes, which were then in the hands of *Richard Marnell*, the bankrupt's agent at *Calcutta*; and to demand payment thereof, and in default of payment, to sue for and recover the amount from *Mullick*.

By virtue of this power, Messrs. *Bruce* & Co. obtained possession of the notes, and demanded payment from *Mullick*, who having refused, *Bruce* & Co. brought an action of Assumpsit in the Supreme Court at *Fort William*, in the name of *Wyatt*, as the surviving assignee, against *Mullick*.

In this action, the Plaintiff declared in his character of surviving assignee of *Thomas Shepherd*, the bankrupt; and the Defendant (the original Respondent) pleaded thereto, that he did not undertake or promise in the manner and form, " as the said *Thomas Wyatt*, assignee as aforesaid, had above thereof complained against him, and of this, &c."

Two days after pleading the above plea, the Defendant gave the Plaintiff notice in writing, that he intended to dispute the trading, petitioning creditor's debt, and the act of bankruptcy.

Upon this plea issue was joined, and on the 26th of *June* 1833, the cause came on for trial before Sir *John Franks* and Sir *Edward Ryan*. On the part of the Plaintiff, the Defendant's signature to the five promissory notes was duly proved, as was also the death of *Nash*, the deceased assignee; and the Plaintiff

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also gave in evidence copies of the Commission of Bankruptcy, issued against *Shepherd*, and of the depositions of the petitioning creditor's debt, the trading, and the act of bankruptcy, and of the Commissioners' adjudication, and the assignment from the Commissioners to the assignees; all which copies purported to be certified by *Thomas Church*, the Clerk of Enrolments in Bankruptcy, and to be under the seal of the Court of Bankruptcy, pursuant to the provisions of the 2nd & 3rd *Will.* IV., c. 114, s. 9.

No evidence was tendered as to the authenticity of the above papers, or of the seal, or certificate, or of the place from whence they respectively came, except that it was proved by Mr. *Judge*, the Plaintiff's attorney, that he received them with a letter and an Act of Parliament, about the end of *March* then last past, from Messrs. *Vandercom* & Co., Solicitors, resident in *London*. The Counsel for the Defendant objected to the reception in evidence of these several papers, on the following grounds,—first, that even if properly authenticated, they were not receivable in evidence, inasmuch as the statute, 6 *Geo.* IV., c. 16, and the statute 2 & 3 *Will.* IV., c. 114, did not extend to govern the rules of evidence in the Supreme Court in *Calcutta*; secondly, that the several papers were not properly authenticated; and, thirdly, that in order to render the depositions admissible in evidence, if receivable at all, it should have been proved that the deponents were dead. The Court, however, overruled the objections, and the several papers were produced and read in evidence, and a verdict was passed for the Plaintiff for 19,064 sicca rupees, 12 anas, (the amount of the five notes, with interest, at 3 per cent.,) liberty being reserved to the Defendant to move to enter a nonsuit.

In the following term, the Defendant obtained a rule *nisi*, calling on the Plaintiff to show cause why the verdict should not be set aside, and a nonsuit entered, on the ground that the verdict was contrary to evidence;—that evidence was admitted which was not legal evidence;—that there was no evidence of the Bankruptcy;—that there was no legal evidence of any act of trading after the period when the 6th *Geo.* IV., c. 16, came into operation;—that the trading, since the 1st *September* 1825, was expressly negatived;—and that the 6th *Geo.* IV., c. 16, was a local act, and not in force in *India.*

On the 27th of *January* 1834, the rule came on for argument before Sir *John Franks* and Sir *John Peter Grant*, when the Court took time to consider their Judgment; and on the 5th of *February* following, Judgment was given, making the rule absolute for setting aside the verdict, and entering Judgment of nonsuit with costs of the cause, together with costs of the rule; on the ground stated in the rule *nisi.*

Against this Judgment the Plaintiff obtained leave to appeal to his late Majesty in Council; but before the transcript of the proceedings reached *England*, *Wyatt* died.

On the 16th of *March* 1836, the present Appellant was appointed official assignee of the bankrupt *Shepherd's* estate and effects; and thereupon, as such assignee, he presented his Petition to revive the Appeal, which by an order of his late Majesty of the 8th of *June* 1838 was duly allowed.

Pending these proceedings, and on the 2nd of *July* 1837, the original Respondent, *Rouplaul Mullick*, died, having duly made and published his last Will

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and Testament, and thereof appointed the three present Respondents, *Sree Mutty Doorgamoney Dosse*, his widow, and *Prawnkissen Mullick*, and *Sreekissen Mullick*, his sons, Executrix and Executors, who proved the same.

By an Order of Her Majesty in Council of the 10th *January* 1839, the Appeal was ordered to be revived against these Respondents.

The Respondents, *Prawnkissen Mullick*, and *Sreekissen Mullick*, were personally served with the above order of Revivor; but the other Respondent, *Sree Mutty Doorgamoney Dosse*, the Executrix, being a Hindoo woman of rank, service upon her personally could not be effected, in consequence of which

Mr. *Edmund Moore*, for the Appellant,

5 July 1839.*

Where, by the custom in *India*, the Respondent (being a Hindoo woman of rank) could not be personally served with an Order of Revivor, the Judicial Committee allowed service to be substituted on her *Dewan* or chief servant.

Moved, on affidavit of that fact, for leave to substitute service of the Order of Revivor on the *Dewan* or chief servant of the Respondent *Sree Mutty Doorgamoney Dosse*, in support of which application he referred to *Bengal* Regulation III. of 1803, sec. XV., 21 *Geo.* III., c. 70, sec. 17.

The Judicial Committee granted the application, and an order was made for substitutional service, in accordance with the terms of sec. XV. of Regulation III. of 1803.

The Respondents having appeared, the Appeal came on for hearing.

* Present: Members of the *Judicial Committee*,—Lord Brougham, Mr. Justice Bosanquet, Mr. Justice Erskine, and the Right Hon. Dr. Lushington.

Privy Councillors,—*Assessors*, Sir Edward Hyde East, Bart., and Sir Alexander Johnston, Knt.

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Sir *William W. Follett*, Q. C., and Mr. *E. Moore*, for the Appellants.

This case is of the first importance, and must be determined with reference to the comity of nations, and the principles of the Civil and Municipal Law.

By the Civil Law, moveables, which include actions and debts, follow the person, and are consequently governed by the law of domicile,* which determines the validity of their transfer. The only exception is where there is some positive customary law, providing for the particular species of property, or giving it an implied locality.† Upon this principle, one independent State will, by the comity of nations, give effect to the laws and judicial acts of another.‡ These are personal, real, or mixed. Of those that are personal, concerning the application of which our inquiry will be presently, they are particular or universal, *i. e.*, such as are purely political and distinctive, or such as take effect at birth, or at an indefinite period, as from marriage, by letters patent, or by a judgment or decree of a competent Court; the latter follow the law of domicile, and are recognised and admitted by every civilized state.§

The statement of these general principles is necessary for the argument we submit, for it is upon their due application that we maintain the Judgment of the Court below to have been erroneous. As far as we can arrive at the reason of that Judgment, the Supreme Court appears to have founded its decision upon two

* Livermore's Diss. 162, 251.

† Story's Com. 337. 3 Burge, Com. 906.

‡ Henry on For. Law, 4.

§ Ib. 4 & 5.

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grounds: first, that the Bankrupt Laws, as a Code, were not applicable to India, so as to carry the Statutes regulating the rules of evidence as to proof of the petitioning creditor's debt, and other matters, into operation there; and, secondly, that the requisites of the Statutes themselves had not been complied with. If the first objection is tenable, all inquiry into the second is immaterial: but if the Court below were wrong in repudiating the Bankrupt Laws as a Code, and rejecting the Statutes as forming part of that Code, then it will be necessary to show that the provisions of the Statutes have been complied with, and that our title as assignees was perfected under them.

Before the Statute 1 & 2 *Will.* IV., c. 56, the assignees derived their title by virtue of the assignment; until that was completed, they had no interest in the bankrupt's estate: but now, by sec. 25 of that Statute, the personal estate and effects, and the real estate of the bankrupt, become vested in the assignees by virtue of their appointment. It is not necessary to inquire into the manner in which the appointment is to be made, it is sufficient to observe, that it is a solemn act, confirmed and established by the Commissioners, and as such is an adjudication by a competent Court, which cannot be questioned or inquired into by any other than the Court of Appeal. The affirmative of the proposition we contend for must, we admit, depend upon the general recognition of the Bankrupt Laws of other countries in our own Courts, as well as of our own in foreign countries. For this purpose it will be necessary to examine, in the first instance, the cases in which the Bankrupt Laws of other countries have been held binding in our own Courts.

It is well known that the question of the recognition

of foreign Bankrupt Laws was, for a long time, a mooted point. Sir *Joseph Jekyl*, Lord *Raymond*, and Lord *Talbot*, all gave opinions, when at the Bar, against their admission; but Lord *Talbot* afterwards held, that though the Statutes of Bankruptcy did not extend to the Colonies, yet that the personal property of an English bankrupt in the Plantations passed to his assignees, *Cleve* v. *Mills*.* This was the first step; and the principle was more fully acknowledged and acted on by Lord *Hardwicke*, in *Mackintosh* v. *Ogilvie*,† where a creditor, a bankrupt residing in *England*, having, upon sentence obtained subsequent to the bankruptcy, proceeded by process from the Court in *Scotland* to recover sums due to the bankrupt's estate there, to an amount much beyond his own debt, was, upon evidence of his intention to quit the kingdom, restrained by a writ of *ne exeat regno*. In 1762, a case was determined before the Privy Council, Assignees of *Buchanan and Hamilton* v. *Hudson and others*,‡ upon Appeal from the Court of Chancery in *Virginia*, whereby the rights of the assignees to the bankrupt's effects in *Virginia*, in the hands of the executors of certain legatees for whom the bankrupt was a trustee, was established, and the operation of our Bankrupt Laws on property situate in another country was fully established. *Solomans* v. *Ross*, in 1764, and *Jollett* v. *De Ponthieu*, in 1769,§ were cases in which the Courts here gave effect to the Bankrupt Laws of *Holland*. *Neale* v. *Cottingham*,‖ which was an intermediate case, was decided in *Ireland*; there the

* Cooke, Bankrupt Laws, 297.

† 3 Swan. 365.

‡ 3 Burge. Com. 910.

§ 1 H. Black. 131, note (e), Ed. by Meymot, 1837.

‖ 1 H. Black. 134.

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Bankrupt Laws of *England* were recognised; and in *Re Wilson*,* determined by Lord *Hardwicke*, that learned Judge held, that the property of a Bankrupt situate in *Scotland*, was, by the assignment, vested in his assignees under an English Bankruptcy. In *Le Chevalier* v. *Lynch*,† Lord *Mansfield* says, "If a Bankrupt has money owing to him out of *England*, as at *St. Christopher's*, *Gibraltar*, &c., the assignment under the Bankrupt Laws so far vests the right to the money in the assignees, that the debtor shall be answerable to them, and shall not turn them round by saying he is only accountable to the bankrupt;" and he cites *Wilson's* case as establishing that rule.

In *Ex parte Blakes*,‡ Lord *Thurlow* is reported to have said, that "he had no idea of any country refusing to take notice of the rights of the assignees under our laws, and he believed no country on earth would do it, besides the Courts in *America*." *Sill* v. *Worswick*,§ determined that a creditor of a bankrupt, who by means of an affidavit of debt made in *England*, after the act of bankruptcy was committed, but before the assignment, had attached money due to the bankrupt in the *West Indies*, which he afterwards received, might be sued by the assignees for money had and received: all the previous authorities were examined both in the argument and the judgment of that case; and though the case as put by Lord *Loughborough* turned rather upon the right of a creditor of a bankrupt in *England*, knowing of the bankruptcy, availing himself, by process commenced in *England*, to retain his debt against the assignees, and to obtain a preference over the other creditors, than upon the

* Cited in *Sill* v. *Worswick*, 1 H. Black. 691. † Douglas R. 170.
‡ 1 Cox. 398. Livermore's Diss. 151. § 1 H. Black. 664.

recognition of the Bankrupt Laws in the Plantations, yet the circumstances respecting their recognition were very fully discussed, and that case has always been considered a leading authority for the point we are now arguing; and has been followed by *Hunter* v. *Potts*,* and *Philips* v. *Hunter*.† In *The Bank of Scotland* v. *Cuthbert*,‡ and *Selkrig* v. *Davies*,§ it was decided that a Commission of Bankruptcy vests in the assignees under it all the property of the bankrupt, wherever situate.

These decisions were before the 6th of *Geo.* IV., c. 16, and must have been upon the principle of the comity of nations, rather than the effect of the Statutes of Bankruptcy then in operation, and, taken in conjunction with those previously cited, led to the enactments of that Statute. Now we maintain, that these authorities fully establish the recognition of the Bankrupt Laws as a Code, and that as the Statutes of Bankruptcy are a part of that Code, their recognition must follow to the extent to which these Statutes are capable of application in a foreign country. The very objection made by the Court below, viz., that the requisites of the Statute of 6 *Geo.* IV., c. 16, and 3 & 4 of *Wm.* IV., c. 113, have not been complied with, affirms that proposition. How can the Supreme Court decide upon the due observance of the Statutes, if they have no application to *India*? And if that Court does decide, then it is interpreting a law which it refuses to recognise—that is an absurdity. We proceed, therefore, to show, that the requisites of the Statutes have been fully complied with.

By the 1st *Jas.* I., c. 15, s. 13, it was enacted,

* 4 Term. Rep. 182. † 2 H. Black. 402.
‡ 1 Rose, Bankr. Cases, 462. § 2 Rose, Bankr. Cases, 97, 291.

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that the Commissioners should have power to grant and assign, or otherwise to order and dispose of all or any of the debts due or to be due, to or for the benefit of the bankrupt, by what person or persons soever, and in what manner and form soever, to the use of the creditors of the bankrupt: the 5th *Geo.* II., c. 30, enlarged the authority of the Commissioners in that respect; but by the 6th of *Geo.* IV., c. 16, s. 63, the Commissioners are empowered to assign all the present and future personal estate of the bankrupt, wheresoever the same may be found or known; and all debts due to the bankrupt, wherever the same may be found or known; and the same authority is given them by the 64th sec. over the real estate of the bankrupt, whether in *England*, *Scotland*, *Ireland*, or any of the dominions, plantations or colonies belonging to His Majesty. The 1st & 2nd *Wm.* IV., c. 56, s. 25, 26 & 27, modifies these provisions, by vesting the real and personal estate absolutely in the assignees, without any assignment from the Commissioners. As respects the right, therefore, of the Commissioners, and the recognition of that right by Foreign Courts, these Statutes and the authorities are conclusive: the question then is, in what manner are the assignees to establish their title; and have they pursued the proper mode here. The Respondents have taken issue on both these points. Before the 5th *Geo.* II., c. 30, s. 41, the depositions could not be given in evidence in an action to try the validity of the bankruptcy, because the Plaintiffs had not had the benefit of cross-examining the witnesses as to the facts deposed to, *Francisco* v. *Gilmore**: to remedy that defect, that Statute made

* 1 Bos. & Pul. 177.

a copy of the proceedings in bankruptcy, evidence in certain cases, after being entered of record; no provision, however, was made, respecting the mode in which such copy was to be authenticated; the 49th *Geo.* III., c. 121, s. 10 & 11, therefore enacted, that the depositions and proceedings themselves should be evidence to prove the petitioning creditor's debt, trading, and act of bankruptcy; the 6th *Geo.* IV., c. 16, s. 92, declared such depositions, &c., to be conclusive evidence of the facts contained in them, unless the bankrupt should give notice of his intention to dispute the Commission within a limited time; and the 2nd & 3rd *Wm.* IV., c. 114, s. 9, enacts, that such depositions and proceedings, purporting to be sealed with the seal of the Court of Bankruptcy, shall be received as evidence of such documents respectively. Thus, therefore, the depositions and proceedings in bankruptcy, when under the Seal of the Court, are made conclusive, and no question can be raised respecting the matters contained in them, unless in the case of notice by the bankrupt, of his intention to dispute the act of trading, petitioning creditor's debt, or commission. Suppose the Supreme Court, for the sake of argument, to be unconnected and unacquainted with the law of *England.* If a judgment of a Foreign Court was brought in suit before it, all that would be requisite by the comity of nations would be, that the law of the Foreign Court should be proved. If the act was an Act of a Court of Justice, as a judgment, then it would be presumed to be consistent with the law of that Court, until the contrary was proved, *Alivon* v. *Furnival*;* if in conformity with a decree of a Fo-

* 1 Cromp. Mees. & Roscoe, 277.

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reign State, then the Court would take cognizance of the decree, as matter of public notoriety. But the case is much stronger here: the Bankrupt Laws, at least so much of them as existed previous to the 13th *Geo.* III., c. 63, under which the Supreme Court in *India* was established, were part of the law of *England*; the commission and assignment were acts of as valid authority and as binding on all the subjects of this realm then as now; the only alteration is in the mode of proving the acts of the Court of Bankruptcy. Is the Supreme Court to be permitted to say, we acknowledge and receive your Bankrupt Laws, nay we act on them, but we require proof of your title, not according to your own laws, but according to what we think requisite? By 21st *Geo.* III., c. 70, s. 6, it is provided that authenticated copies of orders and depositions of the Supreme Court should be receivable in evidence in any of the Courts of Law or Equity, in Westminster Hall. Is the rule only for *England*? and that too when the authority making the rule is the Legislature itself? We submit, therefore, that by the comity of nations,—under the authority of the acts giving existence to the Supreme Court,—as well as by the law of *England*, the Supreme Court is bound to receive an adjudication in bankruptcy, in the same manner and by the same evidence, as it would be receivable here; and that purporting to be sealed with the seal of the Court, it cannot be questioned, unless the authenticity of the document is impeached. It appears that the Judges of the Supreme Court were of this opinion, for they determined that the requisites of the Statutes 6th *Geo.* IV., c. 16, and 2nd & 3rd *Wm.* IV., c. 114, had not been complied with.

By sec. 90 of the Statute of 6th *Geo.* IV., it is provided, that in actions by or against any assignee or other person acting under the Commission, no proof shall be required, at the time of trial, of the petitioning creditor's debt, trading, or act of bankruptcy, unless the other party, if defendant, shall at or before pleading, give notice of his intention to dispute those matters. By the record and plea in the action, it appears that *Wyatt*, having declared as surviving assignee of *Shepherd* against *Mullick*, the Defendant, the latter obtained leave to imparle until the third term, that is to say, the 15th of *June* in the same year, on which day he put in his plea, alleging that he did not undertake or promise "in manner and form as the said *Thomas Wyatt*, assignee as aforesaid, had above thereof complained." This is an admission on the record of the Plaintiffs' title, which no notice to dispute could remove; but supposing such notice available, when is it given? not till two days after the time of pleading, viz., on the 17th: that is fatal to it, even if the title of the assignee was in issue. Yet, notwithstanding these objections, the Court below admits the notice, and proceeds to examine the Statutes, and, as the Respondent insists, decides, that even assuming that the copy of the Commission, and the adjudication and assignment were receivable in evidence, yet that the 92nd sec. of 6th of *Geo.* IV., c. 16, is so far repealed or controlled by the 2nd & 3rd *Wm.* IV., c. 114, s. 9, that depositions are not receivable in evidence, without proof being first given of the death of the defendants. Now though there is undoubtedly some confusion between the 7th and 9th sections, it cannot be maintained that the former overrides the latter; and interpreting them

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together, it is quite clear that the 7th applies only to particular and individual depositions, and not to the record of the proceedings, under the seal of the Court. On all these grounds we submit, that the title of the assignee was acknowledged and admitted on the record, and could not be questioned by the Defendant; that the copies of the proceedings being under the seal of the Court, were conclusive as to the matters contained in them, and that no proof of a trading, subsequent to the 6th *Geo.* IV., c. 16, was necessary or requisite, and even if necessary, was not negatived by any proof on the other side.

Mr. Serjeant *Spankie* and Mr. *E. Vaughan Williams*, for the Respondents.

We admit the general reasoning on the other side respecting the recognition of the rights of the assignees of a bankrupt in a foreign or colonial Court. We cannot dispute that the assignees of the bankrupts, legally appointed, have a right to the property of the bankrupt, wheresoever situate; the position we dispute is, that the Supreme Court in *India*, or any other Court in the Colonies of *England*, is bound, without inquiry or examination, to admit the title of the assignees, or, in other words, the validity of the assignment. To give effect, in fact, to a title founded upon the provisions of an Act of the British Parliament, without looking to see whether those provisions have been properly complied with. The comity of nations has not been carried to that extent in any of the cases cited; all that it requires, is to give effect to a title, when that title is shown to have been legally and properly acquired, according to the law of the domicile of the owner. It is upon this principle that

foreign judgments are recognised and enforced in our Courts here, as well as in the Colonial Courts.

The adjudication of the Court of Bankruptcy here, must, if sought to be made available in the *East Indies*, be proved as a foreign judgment. For this purpose, the seal of the Court does not prove itself even where the Judge's handwriting, subscribed to the judgment, is proved; the seal itself must be proved to be the official seal of the Court, *Henry* v. *Adey*;* that case was in circumstances very similar to the present, and has been followed by *Black* v. *Lord Braybrooke*,† *Appleton* v. *Lord Braybrooke*,‡ *Alvers* v. *Bunbury*: § and where the record upon which a foreign judgment has been obtained is put in proof, the Courts here will go so far as to examine whether the judgment has been pronounced by a competent authority, and in a case within the jurisdiction of the Court. *Buchanan* v. *Rucker*,‖ *Cavan* v. *Stewart*.¶

The rule, that in a suit between parties, both domiciled in *England*, on a contract made by them in a foreign country, the remedy to be taken is according to the *lex loci solutionis*, and not according to the *lex loci contractus*, was established in *De la Vega* v. *Vianna*;** that case overruled the previous decision of *Melan* v. *the Duke de Fitzjames*,†† which decided that if a defendant be held to bail in this country, on an instrument entered into in *France*, by which instrument his property only, and not his person, would be liable, the Court, on

* 3 East, 220.
† 2 Starkie, N. P. R. 7. 6 M. & S. 34.
‡ 2 Starkie, N. P. R. 6. 6 M. & S. 39.
§ 4 Camp. N. P. R. 28.
‖ 9 East. 192.
¶ 1 Starkie, c. 525.
** 1 Barn. & Adol. 284.
†† 1 Bos. & Pul. 138.

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motion, would discharge him, on his entering a common appearance. So in the case of *Huber* v. *Steiner*,* where the French Law of Limitations was pleaded to an action of assumpsit, on a promissory note, made at a place which was subject to the law of *France*, the Lord Chief Justice *Tindal*, said, " We take it to be clearly established and recognised as part of the law of *England*, by various decisions, that if the prescription of the French law, which has been opposed to the Plaintiff in the present case, is no more than a limitation of time within which the action upon the note must be brought in the French Courts, it will not form a bar to the right of action in our English Courts, but that the question whether the action is brought within due and proper time must be governed by the English Statute." *The British Linen Company* v. *Drummond*.†

But if our Courts here are strict in not admitting the operation of the positive laws of a foreign country to control the mode of executing a contract sought to be enforced here, they are much stricter in rejecting rules respecting evidence imposed by a foreign Court. In *Brown* v. *Thornton*,‡ a copy of a charter-party made in *Java*, the original of which was entered in the notary's book, which it was in evidence was never permitted to be taken out of the island, but copies from which are evidence in all Dutch Courts, was rejected as evidence of the charter-party, and the Plaintiff nonsuited.

These authorities show that in enforcing or defending a contract made in a foreign country, but

* 2 Bing. N. C. 202.
† 10 B. & C. 903.
‡ 6 Adol. & Ellis, 185.

sought to be carried into effect here, the Courts will execute it according to the laws of this country. If the contrary doctrine prevailed, it would involve the tribunals of the country in endless perplexity and confusion.

Treating this, therefore, as we insist it is, as a foreign judgment, the Supreme Court had not only power but was bound to examine the record, to see if the judgment had been pronounced by a competent tribunal. It is said that it was precluded from that course, for that the Act of Parliament, 6th *Geo.* IV., c. 16, and 2nd & 3rd *Wm.* IV., c. 114, extend to the East Indies, and by these Statutes, the proceedings tendered were conclusive.

It is necessary, therefore, to inquire, first, how far Acts of Parliament in general apply to the colonial possessions of this country; and, secondly, whether, if the Statutes of Bankruptcy do apply, their provisions have been properly complied with.

Though the colonial possessions of this country are subject to the control of Parliament, they are not bound by any Acts of Parliament, unless particularly named; this is the doctrine laid down by Lord *Coke*,* by *Blackstone*,† by Lord *Mansfield*, in *Rex* v. *Vaughan*,‡ and reported to have been solemnly decided by the Lords of the Privy Council.§ Thus the Statute of Frauds, though received in the establishment of the Colonies of *Jamaica*, *Tortola*, *Antigua*, *Montserrat*, *Dominica*, *Tobago*, *Grenada*, *St. Vincent*, *Bermuda*, *Upper Canada*, and *Prince Edward's Island*, as part of the English law, was not in force in *Barbadoes*, the *Bahamas*, *Nova Scotia*, or *New*

* 4 Inst. 286.
† 1 Com. 108.
‡ 4 Burr. 2500.
§ 2 P. Will. 75.

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Brunswick, until enacted by their own legislatures.* *Campbell* v. *Hall*.† In the *Attorney-General* v. *Stewart*,‡ the same principle was distinctly laid down; the question there was, whether the Statute of Mortmain, 9th *Geo.* II., c. 1, extended to *Grenada*, in the *West Indies*, which it was held not to do; and it was held, that the object of that Statute being wholly political, and the Act intended only to have a local operation, it did not extend to *Grenada*.

The Statutes of Bankruptcy are peculiarly local; they are fiscal regulations for the recovery and distribution of a bankrupt's estate. The Appellants have found it impossible to contend that the Statutes in all their provisions apply to the Colonies, but they say that such parts of them as are of general enactment apply, and they contend that the rules of evidence, incorporated in the 6th *Geo.* IV., c. 16, and 1st & 2nd *Wm.* IV., c. 56, are of such universal application, that they must be held binding in every Court within the British possessions. It is true, that certain rules of evidence, or rather provisions for the reception of evidence, were enacted by those Statutes, and therefore are binding upon the Courts where the Statutes are in force; but the rules formed no part of the Code of Bankruptcy, previous to the Statute of 6th *Geo.* IV., being, as all other rules of evidence, merely arbitrary, and resting exclusively with the Court; and even now, though it is enacted that the seal of the Court should prove itself, if the seal was impeached as a forgery, there is nothing to prevent the Court inquiring into its authenticity; which, if the Statute

* 2 Burge. Com. 526, 785.

† 1 Cowp. 204.

‡ 2 Merr. 143.

were prohibitory, as well as declaratory, would be contrary to its express enactments. The argument, therefore, for their universal application goes too far, even here, to be admitted; but when applied to the Colonies, it is utterly untenable.

But assuming that they did apply to the *East Indies*, the Judges of the Supreme Court held very properly that these provisions had not been complied with; there is no proof of trading sufficient to support the Commission; the deposition in proof of trading states only that the deponent, *Shepherd*, "has known the said *Thomas Shepherd* for the space of ten years now last past, during which time the said *Thomas Shepherd* did use and exercise the trade and business of a merchant;" that is not sufficient to show a trading subsequently to the 6th *Geo.* IV., c. 16; if the trading ceased before that Statute took effect, the Commission cannot be supported. *Surtees* v. *Ellison*,* *Hewson* v. *Heard*,† *Palmer* v. *Moore*,‡ and *ex parte Batten*.§ The affidavit is not sufficient to support an indictment for perjury, it is not definite; an equivocal deposition is insufficient.‖

With regard then to the points of pleading; first, the objection that the notice of plea was not served pursuant to the Act, has been taken now for the first time; no point was raised against the notice in the Court below, nor is it raised on the Appellant's case; it is an afterthought, and cannot, if tenable, be insisted on now. In *Calcutta* no pleas are delivered. Rule 31 of the Supreme Court.

* 9 Barn. & Cress. 750.
† 9 Barn. & Cress. 754.
‡ Ib. 754.
§ 1 Mont. & M'A. 287.
‖ 1 Starkie, N. P. 558.

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It has been further contended, that the Plaintiff's title, as assignee of bankrupt's estate, was admitted on the record, and ought therefore to have been assumed without further proof; this is no admission, before the new rules, for pleading in *assumpsit*; the plea of the general issue put in issue the title of the assignee, even where the breach was laid as by the bankrupt himself: and coupling the plea with the notice, though we admit the pleading to be clumsy, it amounts, in fact and law, but to this, that I did not promise *modo et forma*, as you have complained, viz. "as assignee as aforesaid;" this is but the general issue.

The question, therefore, really is, whether *Wyatt* has shown any title to sue as assignee. Now the assignment is not an absolute assignment, it is dependent on the bankrupt's being a trader within the Bankrupt Laws. The assignment, therefore, is not like a probate, for that is a final act; possession of that would be sufficient here; but before the 2nd & 3rd *Wm.* IV., c. 115, s. 9, the assignment must, like any other documentary title, have been proved; it is not like a judgment, and therefore conclusive, nor would it be so treated by the comity of nations. The case of *Oliver* v. *Furnival*, like the previous one of *Brown* v. *Thornton*, only goes to the extent of admitting secondary evidence of the authenticity of a foreign instrument; but in the case before us, no such evidence was tendered; the proceedings being sealed with a seal purporting to be that of the Court of Bankruptcy, were tendered as conclusive from that circumstance. But the seal of a foreign Court does not prove itself. *Henry* v. *Adey*.

The assignment must be produced and proved in the usual way by the attesting witness, notwithstanding it is entered of record, pursuant to 6th *Geo.* IV., c. 16, s. 96, *Gomersdale* v. *Serle*;* and in *Chambers* v. *Bernasconi*,† it has been solemnly decided that depositions of deceased witnesses taken before the Commissioners at the opening of the Commission, and subsequently enrolled by the assignees under the above section, are not admissible in evidence against the assignees in an action brought against them, to invalidate the Commission. We insist, therefore that the copies of the Commission and proceedings could not be received in evidence, in *India*, without proof of their authenticity being given, and the custody from whence they came, the Statutes 6th *Geo.* IV., c. 16, and 2nd & 3rd *Wm.* IV., c. 114, having no operation in the Colonies or Plantations; and we say further, that even if it could be shown that those Statutes did apply, yet that the requisites of the Statutes are not shown to have been complied with. With respect to the depositions, if admissible, not being so without proof being given of the death of the respective deponents, we do not think it necessary to press that objection; the non-application of the Statutes is sufficient for our argument.

Mr. *E. Moore* (in reply).

The admission of the recognition of the English Bankrupt Laws in the Colonies, is, in fact, the point we are contending for. The Bankrupt Laws are a Code, which the rules in question are but the means of carrying into effect; where applicable, the Laws of

* 2 Y. & J. 5. † 1 Cromp. Mee. & R. 347.

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Bankruptcy must carry the rules for their interpretation with them. The rules themselves therefore form part of the Code of Bankrupt Laws, and, as such, must, by the comity of nations, be admitted. The rule insisted upon, as laid down by this Court, that Acts of Parliament do not bind the Colonies, unless they are specifically mentioned in them, is not consistent with subsequent decisions; it is too large; for though it may be true as regards personal or local affairs, yet where an Act of Parliament is declaratory of the law previously existing, and only intended to carry that law out, as far as that particular law is applicable, the Act of Parliament interpreting it must go with it, and to that extent must apply to our colonial possessions. The Bankrupt Laws were part and parcel of the law of this country previous to charter for creating the Supreme Court. They became grafted then in India as part of the law of England; and as subsequent decisions vary or change, their operation would be recognised; so would also an Act of Parliament for a similar purpose. But Acts of Parliament have been held expressly to take effect in *India*; thus in *Gardner* v. *Fell*,* the Statute of Frauds was held to extend to *India*, so as to prevent lands situate there passing by an unattested will. The same doctrine was maintained in *Freeman* v. *Fairlie*;† and both these decisions were recognized and confirmed in a late case here, *The Mayor of Lyons* v. *The East India Company*.‡ The fact therefore of statuteable provisions applying to the Colonies cannot be disputed. With regard then to the objections to the depositions, the

* 1 Jac. & Wal. 22.
S. C. 1 Moore, Ind. App. 299.

† 1 Moore, Ind. App. 305.

‡ 1 Moore, Ind. App. 175.

deposition of trading is sworn to on the 15th of *July* 1826, nearly a year subsequent to the Act 6th *Geo.* IV., c. 16, coming into operation. No case has been cited to show that the affidavits of trading must specify the period or the particulars of each act of trading. The affidavit of *Parker* is in the usual form adopted in the books of practice.* In *Surtees* v. *Ellison*,† the proof was that the trader had ceased to carry on his business as a seed-merchant since 1822, though the act of bankruptcy was committed in 1827; the proof of trading, therefore, was anterior to the 6th *Geo.* IV., c. 16. The same point arose in *Stanson* v. *Stead*,‡ *Palmer* v. *Moore*,§ and *ex parte Bathe*.‖ In neither of these cases was the Commission superseded because the deposition of trading was insufficient, but because the proof of trading was anterior to the passing of the Act. The notice by *Mullick* of his intention to dispute the bankruptcy being made two days after the plea, is a fatal defect; it is apparent on the face of it, and may therefore be urged at any time. It has been expressly decided, that on the part of the Defendant the notice must be served either before or at the time of pleading, *Poole* v. *Bell*,¶ *Radmore* v. *Gould*,** and *Gardner* v. *Slack*:†† it will not do if served after the plea, *Lawrence* v. *Crowder*:‡‡ the proper course was for him to move to withdraw his plea. The policy of the Bankrupt Laws has been, from their earliest introduction, that they should be general, at least as respects their operation. Like the Trade and Navi-

* Archbold, Law and Practice of Bankruptcy, pt. ii. p. 9.
† 4 Man. & Ry. 586.
‡ 4 Man. & Ry. 586.
§ 9 Barn. & Cress. 754.
‖ Mont. & M'Ar. 287.
¶ 1 Stark. N. P. 328.
** 1 Wightwick. 80.
†† 6 Moore, 489.
‡‡ 3 Car. & P. 229.

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gation Laws, they are intended for universal application; and any decision tending to diminish their force or operation, must act as a check to the commerce and dealing of nations.

Lord BROUGHAM:

19 December

This was an Appeal from the Judgment of the Supreme Court of *Calcutta*, in an action of *assumpsit* brought by the surviving assignee of *Thomas Shepherd*, a bankrupt, upon promises made by the testator of the Respondents to the bankrupt. The Defendant had pleaded the general issue, and had in that plea denied that he "undertook and promised in manner and form as the said Plaintiff, *assignee as aforesaid*, hath above complained." At the trial the Plaintiff gave in evidence a paper, purporting to be a copy of the proceedings in England, endorsed with the signature of a person stated to be Clerk of the Enrolments, and sealed with a seal purporting to be that of the Court of Bankruptcy; no other proof was given of the trading, act of bankruptcy, or petitioning creditor's debt, nor of the commission or assignment. The paper produced was not proved to be a copy of the proceedings in *England*, nor was the seal proved to be that of the Court of Bankruptcy. There was evidence given of trading in India, but not coming down later than 1824. The promissory notes on which the action was brought were proved to have been made by the Defendant, and the death of the person alleged to be the other assignee, and the Plaintiff's survivorship, were also proved.

An objection was taken, that the evidence was not sufficient to prove the bankruptcy and assignment, on the ground that the proceedings are only made evi-

dence on this matter by Statutes which do not extend to *India*; that these proceedings were not duly proved, even if they had been admissible evidence when proved; and that they did not prove, had they been conclusive, a trading subsequent to the 1st of *September* 1825, the day when the 6th *Geo.* IV., c. 16, came into operation. A verdict was taken for the Plaintiff, with leave to move to enter a nonsuit, upon the grounds of these objections; and the Court, upon motion and argument, set aside the verdict, and directed a nonsuit to be entered. This Judgment being brought here by Appeal, the points which appear to have been made below were taken, together with one on the form of the plea, which, it was contended, admitted the Plaintiff's title, by admitting him to be assignee; and another on the defect of the notice to prove the bankruptcy. It was further argued, that his capacity of assignee could not be disputed, because it was not specially traversed by the Defendant. But as the new rules of pleading clearly do not extend to *India*, there can be no doubt whatever that the plea of *non assumpsit* puts the Plaintiff there to a proof of his title, as it did here incontestibly up to the making of those rules. Neither does it appear that the manner in which that plea is framed, imports such an admission as has been contended for. The introduction (wholly unnecessary, no doubt, and very unusual) of the words "*Assignee as aforesaid*," does not appear to their Lordships to be an adoption of the description given by the Plaintiff of the character in which he brings his suit; it is not an admission that he is entitled to sue as assignee, but only a reference to the description which he has given of himself; as if he had said, "*Thomas Wyatt*, who sues as alleging himself

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to be assignee of *Thomas Shepherd.*" The question then will turn on the sufficiency of the evidence before the Court below to prove that title.

It is not denied, that an assignment validly made under a commission here, has the effect of carrying to the assignee a right to sue in *India* for debts due to the bankrupt. This follows from all the rights of the bankrupt being duly vested in the assignee—vested in him by operation of the Bankrupt Laws as effectually as if he had himself made a voluntary transfer of them—good by the law of the country where it was executed. But the question is, whether or not this assignment has been duly proved? The Statutes which have been made to facilitate the proof of the bankruptcy and assignment in the Courts of this country do not extend to the Courts of India. It is unnecessary to cite authority for the proposition that the peculiar rules of evidence adopted in one country, whether established by the practice of its Courts, or enacted by the Legislature (as in the present instance,) for the Government of those Courts, cannot be extended to regulate the proceedings of Courts in another country, where transactions that took place in the former country come to be inquired of. This was assumed as indisputable, both by the Court and on both sides of the bar, all through the case of *Brown* v. *Thornton* (6 Adol. & El. 185); and the principles upon which the proposition rests were clearly recognized in *Huber* v. *Steiner* (2 Bing. N. S. 202), *British Linen Company* v. *Drummond* (10 Barn. & Cress. 903), and other cases. The provisions respecting evidence, in the Statutes 6th *Geo.* IV., c. 16, and 2nd & 3rd *Wm.* IV., c. 114, do not extend to the Courts of India: and in those Courts, evidence

must be given such as would have been required to prove the facts had no such Statutory Regulations been made. Now in the present case, the proceedings were not receivable at all, to prove the facts stated in them, and even if the proceedings could have proved these facts, the papers purporting to set them forth were not authenticated, either by the evidence of those who had examined them with the originals, or by proof of the seal under which they were said to be exemplified. But their Lordships do not consider that the depositions, had they been fully and duly before the Court, would have been sufficient to support the Plaintiff's title; inasmuch as they fail to show a trading after the Statute (6th *Geo.* IV., c. 16,) came into operation, which has been repeatedly held to be necessary by the Courts in this country, and the want of which would have made the evidence unavailable even had it been given here. *Surtees* v. *Ellison* (9 Barn. & Cress. 750), *Hewson* v. *Heard* (9 Barn. & Cress. 754), and other cases.

An objection upon the notice has been taken at the hearing of this Appeal, which was not made in the Court below, to the ground of moving for a nonsuit. It was stated that the notice to dispute the bankruptcy was dated two days after the plea appears by the record to have been pleaded. If this had been urged below it might have been obviated by showing that the plea was not actually filed before serving the notice. The Defendant had to the first day of term to imparle, which would entitle him to plead at any time within the four first days of the term, and the first day being the 15th, the notice was dated on the 17th, within

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these first four days. The Plaintiff plainly treated the notice as regular; for he endeavoured to prove his title by the assignment, without taking any objection to the irregularity, any more than he availed himself of the supposed admission of his title by the frame of the plea.

But, indeed, as the Statutory provisions respecting notice do not extend to *India*, any more than those respecting the admission of evidence, the plea of *non assumpsit* put the bankruptcy and assignment in issue sufficiently without any notice.

Their Lordships are therefore of opinion, that the Judgment of the Court below is well grounded, and ought to be affirmed.

But it is necessary to state, that their Lordships in coming to this conclusion do not proceed upon a ground which appears among others to have been taken below, which was also taken here, that the provisions of 6th *Geo.* IV., c. 16, s. 92, are so far repealed by those of 2nd & 3rd *Wm.* IV., c. 114, s. 7 & 9, as to make the depositions evidence only in the case specified by the latter Act, of the witnesses being dead.

The Judgment of the Court below must be affirmed, with costs.

JOHN CALDER - - - - - - *Appellant*,

AND

ROBERT CRAIGIE HALKET - - *Respondent*.*

On Appeal from the Supreme Court of Judicature, at Fort William, in Bengal.

5th Dec. 1839, and 4th & 8th July 1840.

THIS was an action of Trespass, brought by the Appellant against the Respondent, in the Supreme Court of Judicature, at *Fort William*, to recover damages for the arrest and false imprisonment of the Appellant, by the Respondent, in his character of Judge and Magistrate of the *Foujdarry*† Court of the *Zillah* of *Nuddeah*, in *Bengal*.

The Appellant was the manager of a factory at *Bayadangah*, in the same *Zillah*, belonging to Mr. *David Andrews*. Both the Appellant and Respondent were European British-born subjects. The proceedings which gave rise to the imprisonment complained of, were as follows :—

On the 29th of *July* 1834, an affray took place in a village called *Dutt Boahleah*, within the *Zillah* of *Nuddeah*. On the following day, the police *Darogah* of the adjoining *Thanah*‡ of *Hanskolly*, within which the village of *Boahleah* is situate, reported the particulars of the riot to the Respondent, as acting Magis-

The 21st *Geo.* III., c. 70, s. 24, protecting Provincial Magistrates in *India* from actions for any wrong or injury done by them in the exercise of their Judicial Offices, does not confer unlimited protection, but places them on the same footing as those of English Courts of a similar jurisdiction, and only gives them an exemption from liability when acting *bonâ fide* in cases in which they have mistakenly acted without jurisdiction.

* Present: Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, and the Right Honourable Dr. Lushington.

† Criminal. ‡ Police station.

Trespass will not lie against a Judge for acting judicially, but without jurisdiction, unless he knew, or had the means of knowing, of the defect of jurisdiction, and it lies upon the Plaintiff, in every such case, to prove that fact.

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trate of the *Foujdarry* Court of the *Zillah* of *Nuddeah*, and transmitted the depositions of the wounded persons, as well as some of the witnesses of the affray.

The Respondent, Mr. *Halket*, being of opinion that the Appellant was concerned in the riot, directed a *robocarree* (or order of instructions for the mode of proceeding in the case) of the *Foujdarry* Court at *Kishnaghur*, to be made and passed, by which it was ordered, (amongst other things,) that a *Perwannah* should be written and directed to the *Darogah*, for the apprehension of Mr. *Calder*.

The *robocarree* was signed by the Respondent, and a *Perwannah* was accordingly issued on the same day, and delivered to the *Darogah* of the *Thanah* of *Hanskolly*. Under the authority of which, the Appellant was detained, and kept under surveillance of two *Burhurdanzes*,* within the boundaries of Mr. *Andrews's* factory.

The Appellant was ultimately brought before Mr. *Halket*, the Respondent, as Acting Judge of the *Foujdarry* Court at *Kishnaghur*, and after some days' investigation, admitted to bail; and was eventually bound by recognizance, to appear when called upon. The greater part of the other prisoners charged with being concerned in the riot, were convicted, and sentenced to different periods of imprisonment: but no further proceedings were taken against Mr. *Calder*.

Upon the 6th of *March* in the following year, 1835, Mr. *Calder* commenced an action of Trespass, in the Supreme Court at *Calcutta*, against Mr. *Halket*, for assault and false imprisonment. The Declaration

* Matchlock-men.

contained three counts. The first alleged that the Respondent assaulted and imprisoned the Appellant for thirty-four days, at *Bayadangah*. The second, that the Respondent had laid hold of the Appellant, and compelled him to go from a house in *Bayadangah* to a place called *Poolia*, and from *Poolia* back to *Bayadangah*, and then to *Kishnaghur*, and there imprisoned him for twenty-five days. And the third count alleged that the Respondent had assaulted and imprisoned the Appellant at *Kishnaghur*, for thirty-four days.

The Respondent pleaded the general issue; and also six special pleas, justifying the said several arrests and imprisonments, as done by him as Magistrate of the district of *Nuddeah*, in the province of *Bengal*, and of the Criminal Court of the same district.

The Appellant joined issue upon the first plea, and replied *de injuria* to the six special pleas upon which issue was joined.

The cause came on for trial before the Supreme Court, on the 23rd of *July* 1835, when several witnesses were examined on both sides, and a verdict was given for the Plaintiff, on all the issues joined in the action, with damages to the amount of five hundred sicca rupees, but with liberty for the Respondent to move that the verdict should be set aside and a *nonsuit*, or verdict for the Respondent, entered instead thereof, upon three several points reserved, viz., 1st, That there was no proof of the arrest of the Appellant by the Respondent's order; 2ndly, That under the provisions of the Statutes 21st *Geo.* III., c. 70, sec. 24, and 53rd *Geo.* III., c. 155, sec. 105, and the *Bengal* Regulations in force in the Presidency, the

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Respondent was not liable to the Supreme Court in an action for damages; the acts proved appearing in evidence to have been acts done by him as Magistrate of the Provincial Court of *Kishnaghur*; and, 3rdly, that under the general issue a sufficient justification was proved.

A rule *nisi* to that effect was granted on the 2nd of *November*.

On the 24th of *November* 1835 the several points reserved were argued before the Supreme Court, who were of opinion, that the arrest having taken place under the seal of the *Foujdarry* Court, and the Appellant being a British-born subject, and not amenable to the jurisdiction of the *Foujdarry* Court of the *Zillah*, the Respondent had failed to support his special pleas. They were however of opinion, that under the general issue, the Respondent was entitled to avail himself of the protection of the 24th section of the Statute 21st *Geo.* III., c. 70, which precluded the Supreme Court from holding jurisdiction in the action against the Respondent, and accordingly adjudged that the verdict should be entered for the Respondent on the general issue, with costs, and costs of motion.

From this judgment the Appellant appealed to Her Majesty in Council.

Mr. *M. D. Hill*, Q. C., and Mr. *C. Buller*, for the Appellant.

The judgment of the Supreme Court cannot stand; they admit the trespasses, but say they have no jurisdiction to try the question, the Respondent having acted in his magisterial capacity, and not being amenable to the Supreme Court. This is contrary to law,

as well as against the true construction of the Acts 21st *Geo.* III., c. 70, and 53rd *Geo.* III., c. 155. The rule at law is, that if an action be brought against a judge of record for an act done by him in his judicial capacity, he must plead that he did such act as a judge of record before he can avail himself of such justification.* The Respondent pleaded the general issue. Now supposing him to be a judge of record, that is clearly insufficient; but he also pleaded specially, that the acts were done by him in his magisterial capacity; yet the Court held these pleas were not supported, but they held the plea of the general issue sufficient, under the 21st *Geo.* III., c. 70, s. 2 and 24. That Act was passed to explain and amend the previous one of 13th *Geo.* III., c. 63, under which the Supreme Court was first established; by the second section it is provided, that persons impleaded in the Supreme Court, for acts done by order of the Governor-General in Council, may plead the general issue. But the trespass of the Respondent was not an act so done. The Respondent is a Judge of the *Foujdarry* Court, and, according to the *Bengal* Regulation I. of 1772,† first establishing that Court, but an officer of police, having no jurisdiction over any but natives; and though appointed by the Governor-General in Council, the acts done by him in his judicial capacity never can be construed to be acts done by the order of the Governor-General, so as to entitle him to plead the general issue. The 24th section of the Act recites, that whereas it is reasonable to render the Provincial Magistrates, as well native as British-born subjects, more safe in

* Lord Mansfield, in Mostyn *v.* Fabrigas. 1 Cowp. 172.

† See Letter of Committee of Circuit, para. 5.

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the execution of their office, it is enacted, that no action for wrong or injury shall lie in the Supreme Court, against any person whatsoever exercising a judicial office in the County Courts, for any judgment, decree, or order of the said Court, nor against any person for any act done by or in virtue of the order of the said Court. Now, in the first place, this clause applies to the orders of the Court, and not to the individual acts of the judge; and, in the next place, the judgments, orders, or decrees, intended by the Legislature, are such as the judicial officer has authority to exercise, viz., over natives, and not over British subjects, who are not subject or amenable to the jurisdiction of the Provincial Magistrates. Here the Respondent, a *Mofussil* Magistrate, issues a *Perwannah* for the arrest of the Appellant, a British-born subject, without the oath of any party being taken, without any charge made, without any accusation, or even accuser, but solely on his own suspicion, drawn, it may be, from the report of the *Darogah*, but of which the Respondent is in utter ignorance. The Act of 21st *Geo.* III., c. 70, was never intended for such a case as this, nor can it be strained to meet it. If the construction given by the Supreme Court to the 24th section be correct, the Appellant will be without redress at law; he cannot sue the Respondent in the district in which the acts happened, and the Native Courts of *Sudder* and *Nizamut* are Courts of Appeal without original jurisdiction. The consequence will be, that the local Magistrates in *India* will enjoy a protection and immunity not possessed by a Judge of the highest Court of Record in *England*.

Then it is said that the Respondent, being a justice of the peace, had jurisdiction under the 53rd *Geo.* III.,

c. 155, s. 105; but that clause applies only to cases of arrest of a party complained of, after the case has been heard and decided, and a fine imposed and not paid, and no property found within the district from which such fine could be levied. The question then is, whether the Respondent, being, as it is admitted, a justice of peace, and as such amenable to the Supreme Court, can be permitted to say that the act done by him was in his capacity of Judge of the *Foujdarry* Court, and not as a magistrate, and that as such Judge he is entitled to plead the general issue, and to the protection of the 21st *Geo.* III., c. 70. We do not contend that an action would lie against the Respondent acting within his jurisdiction; the statute 21st *Geo.* III., c. 70, protects the Judges of the Native Courts in *India* in the same manner as those of 7th *Jac.* I., c. 5, 21st *Jac.* I., c. 12, s. 15, and 42nd *Geo.* III., c. 85, s. 6, protect the Judges of our own Courts; but if the act done be out of the jurisdiction of the judge, then he is not protected. *Bushel's* case.* *Hammonds* v. *Stowell.*† *Miller* v. *Seare.*‡ This doctrine was admitted in *Dicas* v. *Lord Brougham,*§ and formed the basis of the decision in *Mostyn* v. *Fabrigas.* If an act is done by a judge as judge of record, in his judicial capacity, then no action will lie against him. *Grosewelt* v. *Burwell.*‖ But the *Foujdarry* Court is not a Court of Record, it is the native Criminal Court, created under the Regulation of 1772, at the same period as the Sudder, which has been held, as we are instructed, by the Supreme Court not

* 1 Mod. 119.
† 1 Mod. 184. ‡ 2 Black. 1141.
§ 6 Carrington & Payne, 249.
‖ 1 Lord Ray. 454; 1 Salk. 200.

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to be a Court of Record. If a party not being a Judge of a Court of Record improperly grants a warrant, on which another is imprisoned, an action lies, *Beardmore* v. *Carrington*,* *Burdett* v. *Abbott*,† and he must plead specially. Now though the warrant is sealed with the seal of the *Foujdarry* Court, the act of granting it was a ministerial and not a judicial act, and being an excess of jurisdiction, an action will lie for it. *Beaurain* v. *Scott*.‡ The distinction between a ministerial and judicial act was taken and insisted on with great learning and ability in a case in the Court of Common Pleas in *Ireland*, *Taaffe* v. *Downes*, *Chief Justice of the King's Bench*.§ The Plaintiff having been arrested upon a warrant from the Chief Justice, brought an action of assault and for false imprisonment, to which the Defendant pleaded that he was Chief Justice of the King's Bench, and that as such, and in the course of his office of Chief Justice, issued his warrant. The Plaintiff demurred, because the Defendant did not justify by his plea the issuing the warrant, by setting forth the causes for which, as well as the authority under which, it was issued. The case was elaborately argued by the most eminent men at the Irish bar, and though the Court gave judgment against the demurrer, one of the Judges, Mr. Justice *Fletcher*, being dissentient, yet the distinction between the ministerial and judicial acts of a Judge, which formed the ground of his dissent, was not controverted by the other Judges, who only held that the act in question was legal, and could

* 2 Wilson, 244. † 14 East., 1.

‡ 3 Camp. 388.

§ Reported by Hatchett, and printed in Dublin 1815.

not be questioned because it was a judicial act. The Chief Justice, however, was a Judge of Record; even therefore admitting the case to have decided that a Judge could not be questioned for an act ministerial, but in the nature of a judicial act, that decision cannot be relied on here, for there is no pretence for saying that the *Foujdarry* Court is a Court of Record, or its Judges any thing higher than our justices of the peace. In *Tate* v. *Chambers*,* where a magistrate committed a man under 39th & 40th *Geo.* III., c. 99, s. 8, (the Pawnbrokers' Act,) for re-examination upon a charge of embezzlement, and not of penalty, as provided by the Act, the magistrate was held liable to an action for exceeding his jurisdiction. The proceeding of the Respondent was an act in pais and not of record, for which he is amenable, if he has exceeded his jurisdiction; this, we maintain, he clearly has done; the judgment therefore entered up by the Supreme Court for the Respondent on the general issue must be reversed, and the cause remitted back to the Court to assess the damages due to the Appellant, for the wrong and injury he has sustained.

Mr. Sergeant *Spankie*, Sir *William Follett*, Q. C., and Mr. *Greenwood*, for the Respondent.

The action of trespass brought against the Respondent by the Appellant, was not sustainable in the Supreme Court, for two reasons; first, because the Respondent, acting *bonâ fide* in the execution of his office as a magistrate of the *Foujdarry* Court, in a case

* 3 Nev. & Man. 523.

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within the jurisdiction of that Court, is protected by the Statutes 21st *Geo.* III., c. 70, s. 2 & 24, and 53rd *Geo.* III., c. 155, s. 105; and, secondly, because it did not appear upon the trial, nor was there any ground for the Court to presume, that the Respondent had any notice of the fact, or any reason to suppose that the Appellant was not a native, and as such amenable to the jurisdiction of the *Foujdarry* Court. The sections 2 & 24 of the 21st *Geo.* III., c. 70, must be taken together; the latter provides that no action shall lie in the Supreme Court against any person whatsoever exercising a judicial office in the County Courts, for any judgment, decree, or order of the said Court; and by the former, any person impleaded in the Supreme Court for any act done by order of the Governor-General in Council, may plead the general issue. Now it is admitted that the parties engaged in the riot were not natives, and as such amenable to the jurisdiction of the Native Courts. The Appellant was the exception; he, it seems, was an European and a British subject; but how was Mr. *Halket* to know that circumstance? his name would not necessarily import the fact,—he might be half-caste: it is clear that he was engaged with others, who were amenable to the jurisdiction of the *Foujdarry* Court, in a common breach of the law; when, therefore, he was apprehended, if he intended to avail himself of his privilege as a British subject, he should have moved for a warrant to be discharged; that would have been the course here; and if he had that remedy, can he lay by, and then bring his action? But if a magistrate acts *bonâ fide*, he is protected against all unintentional errors; that is the principle upon which all the Acts of Parliament for their protection are framed; and the

decisions of the Courts are in accordance with that principle, *Walker* v. *Toke*,* *Beechey* v. *Sides*,† *Price* v. *Messenger*.‡ The 7th *Jac.* I., c. 5, made perpetual by 21st *Jac.* I., c. 12, first enabled an officer impleaded for the execution of his office, to plead the general issue. By the 42nd *Geo.* III., c. 85, s. 6, this provision was extended to all persons having, holding, or exercising, public employment in or out of the kingdom, and who by law are empowered to commit persons to safe custody; so that, independent of the Statute 21st *Geo.* III., c. 70, the Respondent, being a person having legal authority to commit, if sued in this Court, might have pleaded the general issue: but it is said, that this arrest of the Appellant was not within the intent or meaning of 21st *Geo.* III., c. 70. The instrument of arrest is a *Perwannah*, which is something more than a warrant, for it sets forth the report of the *Darogah* on which it is founded, and then proceeds to order the arrest of the parties implicated in the riot, who are to be detained until the arrival of the presence, that is, the Judge, and not brought, as would be the case here, immediately before him for examination. It is an order, and being sealed with the seal of the Court, must be taken to be an order of the Court, and as such is precisely within the 24th sect. of the Act 21st *Geo.* III., c. 70. Then is Mr. *Halket* liable to an action of trespass for excess of jurisdiction in a matter over which he had already, as respected the natives, jurisdiction, without notice of the Appellant's character of a British subject? That is contrary to the principle of all the cases. If a Judge

* 9 East. 364. † 9 Barn. & Cress. 806.
‡ 2 Bos. & Pul. 158.

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having jurisdiction, exceed it by mistake, no action can be maintained against him. *Gwynn* v. *Poole*,* *Truscott* v. *Carpenter*,† *Lowther* v. *Earl of Radnor*.‡ In *Dicas* v. *Lord Brougham* there was no special plea, the plea of the general issue was held sufficient. If there is a general law, as an Act of Parliament, the Court are bound to take notice of it; it need not be pleaded in abatement; that was settled in *Parker* v. *Elding*,§ and has been followed by *West* v. *Turner*.‖ The effect of reversing the judgment of the Supreme Court would be to allow actions to be brought against individual Judges for the acts of the Court; that is plainly contrary to every dictum and decision to be found. The judgment, therefore, of the Court below must be affirmed, and the Appeal dismissed with costs.

Mr. *Hill*, in reply.

The construction put upon the 21st *Geo.* III., c. 70, is inconsistent with the provisions of the Act itself. It is contended that by the 24th section, judicial officers are indemnified from any proceedings in respect of acts done by them as such; but the two succeeding sections provide for the case of informations being brought against them for corrupt acts. The argument puts them too high: they may be indicted; is that consistent with their being Judges of Record, and as such protected? The Judges of the Court of Record here can only be proceeded against by impeachment; they are amenable to Parliament alone for their acts; are the Judges of the *Foujdarry* Court in *India* on the

* Lutch. 937; 1 Ld. Ray. 231.
† 1 Ld. Ray. 229.
‡ 8 East. 113.
§ 1 East., 352.
‖ 6 Add. & Ell. 614.

same footing? In the 53rd *Geo.* III., c. 155, s. 105, the local courts are described as established by the East India Company; they are not King's Courts in the sense of the Superior Courts here; and if not King's Courts, then they have only a local and limited jurisdiction, and their Judges must be accountable for any excess in the exercise of it. If a Judge acts in a matter or subject in which he has no jurisdiction, he is liable to an action; but if he has jurisdiction, though he proceed erroneously, no action will lie,—that was the distinction taken in the *Marshalsea* Case,* and by *Holt*, C. J., in *Grosewelt* v. *Barwell*; by *Powell*, B., in *Gwynn* v. *Poole*; and by *De Grey*, C. J., in *Miller* v. *Seare*;† and was the foundation of the more modern case of *Acherley* v. *Parkinson*.‡ The argument that the Respondent had jurisdiction over natives, cannot be carried to give him any over British subjects, who are expressly exempted from the operation of the native courts. The arrest of the Appellant was not a judicial act, or founded on any judicial proceeding. The Respondent had no right to do more than issue a summons, and immediately he found that the Appellant was a British subject, he must have been discharged. He began by exceeding his authority as a magistrate, acting judicially when he ought only to have acted ministerially, and proceeding summarily when he ought first, at least, to have inquired and ascertained that he had jurisdiction to act at all; he is therefore not entitled to any privilege, and ought not to be screened from the consequences of his own deliberate act.

* 10 Rep. 76, 2nd Res.. .

† 2 Black. 1145.

‡ 3 Maule & Sel. 411.

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Mr. Baron PARKE:

The material question in this case is, whether the Defendant, being a Judge of the *Foujdarry* Court of the *Zillah* of *Nuddeah*, was, in that character, entitled to the protection of the 21st *Geo.* III., c. 70, s. 24, for issuing his order, or *Perwannah*, and for what was done in obedience to it.

This section is as follows:—" And whereas it is reasonable to render the Provincial Magistrates, as well natives as British subjects, more safe in the execution of their office, be it enacted, That no action for wrong or injury, shall lie in the Supreme Court, against any person whatsoever, exercising a judicial office in the Country Courts, for any judgment, decree, or order of the said Court, nor against any person for any act done by or in virtue of the order of the said Court."

Three meanings may be attributed to this clause.

First. It may mean that no action should lie against one exercising a judicial office, in the County Courts, for any judgment, decree, or order of the Court, whether in a matter in which the Court had a jurisdiction or not, or whether the Judge wilfully and knowingly gave judgment or made an order in a matter out of his jurisdiction or not; so that the fact of the existence of a judgment, decree, or order, should preclude all inquiry.

Secondly. It may mean to protect the Judge only where he gives judgment, or makes an order, in the *bonâ fide* exercise of his office, and under the belief of his having jurisdiction, though he may not.

Thirdly. The object may have been to put the Judges of the Native Courts on the footing of Judges

of the Superior Courts of Record, or Courts having similar jurisdiction to the Native Courts here, protecting them from actions for things done within their jurisdiction, though erroneously or irregularly done, but leaving them liable for things done wholly without jurisdiction.

It seems to us, that the first of these constructions is inadmissible. It never could have been intended to give such unlimited power to the Judges of the Native Courts, and reason points out that the general words of the clause must be qualified in the manner stated in one of the two latter modes of construction.

We think that the third is the right mode, and that the true meaning of the section in question was to put the Judges of Native Courts of Justice on the same footing as those of English Courts of similar jurisdiction. There seems no reason why they should be more or less protected than English Judges of general or limited jurisdiction, under the like circumstances. To give them an exemption from liability, when acting *bonâ fide* in cases in which they had, though mistakenly, acted without jurisdiction, would be to place them on a better footing than English Judges or Magistrates, and to leave the injured individual wholly without civil remedy; for English Judges, when they act wholly without jurisdiction, whether they may suppose they had it or not, have no privilege; and the justices of the peace, whether acting as such, or in their judicial character, in cases of summary conviction, have no other than that of having notice of action, a limitation of time for bringing it, a restriction as to *venue*, the power of tendering amends, and of pleading the general issue, with certain advantages as to costs.

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This construction is that contended for by the Appellant, and to that extent we think that the Appellant is right. But in applying that rule to the facts in evidence in the present case, we think that enough does not appear to make the Defendant a trespasser.

We must consider the Defendant as being in the same situation as a Criminal Judge in this country, with the qualification, that he had no jurisdiction over one particular class, viz., the European-born subjects of the British Crown; and the question is, whether he is liable to an action of trespass, for causing the Plaintiff to be arrested, he being, in reality, exempt from his jurisdiction.

If the particular character of the Plaintiff be not taken into consideration, and if the case be treated as if he had been a native subject, there is no doubt that the Defendant would have been protected; for it is not merely in respect of Acts in Court, acts *sedente curiâ*, that an English Judge has an immunity, but in respect of all acts of a judicial nature, as was decided in the case of *Taafe* v. *Lord Downes*: and an order under the seal of the *Foujdarry* Court, to bring a native into that Court, to be there dwelt with on a criminal charge, is an act of a judicial nature, and whether there was any irregularity or error in it, or not, would be dispunishable by ordinary process at law. But the protection would clearly not extend to a judicial act, done wholly without jurisdiction; and it is contended, that this order, with reference to a British-born person, is altogether without jurisdiction, because such person was not answerable to the general jurisdiction of the Court; and the special jurisdiction given by the 53rd *Geo.* III., c. 155, s. 105, did not warrant the mode of proceeding in this case, there

being no information or complaint by a native; nor did that section of the Statute authorise imprisonment in the first instance.

But the answer to the objection to the Defendant's jurisdiction, founded on the European character of the Plaintiff, is, that it does not appear distinctly in the evidence, upon which alone we are to act, whatever our suspicions may be, that the Defendant knew, or had such information, as that he ought to have known of that fact; and it is well settled that a Judge of a Court of Record in *England*, with limited jurisdiction, or a Justice of the Peace, acting judicially, with a special and limited authority, is not liable to an action of trespass for acting without jurisdiction, unless he had the knowledge or means of knowledge of which he ought to have availed himself, of that which constitutes the defect of jurisdiction. Thus in the elaborate judgment of Mr. Baron *Powell*, in *Gwynn* v. *Poole* (Lutw. App. 1566), it is laid down, that a Judge of a Court of Record in a borough was not responsible, as a trespasser, unless he was cognizant that the cause of action arose out of the jurisdiction, or at least, that he might have been cognizant, but for his own fault; which last proposition Mr. Baron *Powell* illustrates by a reference to the case of the *Marshalsea Court*, which had jurisdiction only in certain cases where the king's servants were parties, who being all enrolled, the Judge ought to have had a copy of the enrolment, and so would have known the character of the parties. It is true, says Mr. Baron *Powell*, (speaking of the case of a Borough Court,) that the cause of action does not arise within the jurisdiction of the Court, as it ought to do, but as the Judge cannot know that, except by the Plaintiff or Defendant, until he knows it, the rule

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shall be in this case, as in others, "*ignorantia facti excusat.*" Mr. Baron *Powell* lays down the same rule as to a party; but his opinion in that respect is disapproved of by Lord Chief Justice *Willes*, in *Moraria* v. *Sloper* (Willes, 35), but not so far as it relates to a judge or officer.

The like rule has been followed, in the case of Magistrates acting under the special powers of Acts of Parliament, who are not liable as trespassers, if they have jurisdiction to inquire into the facts stated before them, and nothing appears on one side or the other to show their want of jurisdiction. *Pike* v. *Carter* (3 Bingham, 78), *Lowther* v. *Earl of Radnor* (8 East, 13). It is clear, therefore, that a Judge is not liable in trespass for want of jurisdiction, unless he knew, or ought to have known, of the defect, and it lies on the Plaintiff, in every such case, to prove that fact.

In the case now under consideration, it does not appear from the evidence in the case, that the Defendant was at any time informed of the European character of the Plaintiff, or knew it before, or had such information as to make it incumbent on him to ascertain that fact. The point, therefore, which is contended for by the Plaintiff, does not arise; and it is unnecessary to determine, whether, if distinct notice had been given by the Plaintiff to the Defendant, or proof brought forward that the Defendant was well acquainted with the fact of his being British-born, the Defendant would have been protected in this case, as being in the nature of a Judge of Record, acting irregularly within his general jurisdiction, or liable to an action of trespass, as acting by virtue of a special and limited authority, given by the Statute, which was not complied with, and therefore altogether without jurisdiction.

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The only doubt their Lordships have had in the consideration of this case, is, whether the evidence was sufficient to show that the Defendant knew or ought to have known, that the Plaintiff was a British-born subject. They have had none, that it was competent for the Defendant to give his defence in evidence, under the general issue, by force of the Statute 42nd *Geo.* III., c. 85, s. 6, if not at common law.

RAJAH GOPAL INDER NARAIN ROY - *Appellant*,

AND

RAJAH JAGARNATH GURG - - - - *Respondent*,

IN THE MATTER OF THE PETITION OF

The said RAJAH GOPAL INDER NARAIN, security in the Cause wherein RAJAH MOTEE LAL OPUDHIYA was - - - } *Plaintiff*,

AND

MOTEE HURA, the Step-mother of the said RAJAH JAGARNATH GURG, was } *Defendant*.*

On Appeal from a Final Order of the Sudder Dewanny Adawlut of Bengal.

10th Dec. 1839.

THIS was an Appeal from an order made by the Sudder Dewanny Adawlut of *Bengal*, on the 2nd *March* 1807,

Security of five individuals tendered by a Plaintiff on Appeal from the Zillah Court, having been reported by the *Nazir* insufficient, the security-bond of an additional surety was offered, and being reported sufficient, was accepted by the Zillah Court. An Appeal having been lodged against the sufficiency

* Present: Members of the *Judicial Committee*,—Lord Brougham, Mr. Justice Bosanquet, Mr. Justice Erskine, and the Right Hon. Sir Herbert Jenner.

Privy Councillor,—*Assessor*, Sir Edward Hyde East, Bart.

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declaring the security entered into by the Appellant, *Gopal Inder Narain*, for the prosecution of an appeal from the Zillah Court of *Midnapore*, in the above-mentioned cause, to be valid and sufficient, under the following circumstances.

In the year 1804, *Motee Lal Opudhiya* commenced a suit *in formâ pauperis*, in the Zillah Court of *Midnapore*, for the recovery of certain *Pergunnas*, situate in the *Zillah* of *Midnapore*. By a Decree made on the 18th *July* 1805, it was declared, that the Plaintiff had made out his claim to the *Pergunnas* in question, and entry upon them was accordingly decreed to him with costs.

On the 9th of *September* 1805, an order was made for the execution of the Decree, which was carried into effect by the Judge of the Zillah Court causing *Motee Lal* to be put into possession. At this time, the Defendant, *Motee Hura*, had appealed to the Provincial Court, but the Zillah Judge, not having notice that an appeal was entered, did not take or require security from *Motee Lal*, previous to his being put into pos-

of this new security, and the Provincial Court having pronounced it insufficient, it was referred back to the Zillah Court, with directions, that unless sufficient security was given, possession of the property in dispute should be delivered to the Collector. The Zillah Court, upon further investigation, being satisfied with the sufficiency of the additional surety, a security-bond was executed in that Court by the Appellant, the additional surety, alone, the other five sureties having failed to perfect their securities. On application after the decision in the cause, and pending an Appeal to the King in Council by the Appellant, to be discharged from the liability of his suretyship, on the grounds that the rejection of his security by the Provincial Court for insufficiency, thenceforth rendered his security null and void; and that the acceptance of his security alone by the Zillah Court, without the other five sureties, was without his knowledge and consent,— it was held by the Privy Council (affirming the Judgment of the Court below), that the security-bond being on record, was not voided by the rejection by the Provincial Court on its supposed insufficiency; the Zillah Court having revived the same by their acceptance of the Appellant as surety, and he having taken no steps to discharge his liability, by having the security-bond taken off the file.

session. With a view to remedy this omission, an order was made by the Provincial Court, on the 17th day of *December* 1805, directed to the Zillah, requiring the Judge of that Court to call for security from *Motee Lal*, for one year's produce of the *Pergunnas*, and prescribing the period of two months for taking that security.

On the 14th of *February* 1806, the Plaintiff, *Motee Lal*, tendered to the Zillah Court, *Bheem Chund Kyal* and *Sahoo Ram Kyal*, *Talookdars*, as his securities, and an order was thereupon given to the *Nazir* of the Court to inquire and ascertain their sufficiency. The *Nazir* reported that these persons were not possessed of sufficient property; whereupon the Plaintiff, on the 17th of the same month, tendered *Ram Kunhaye Kyal*, *Nur Hurree Kyal*, and *Luckee Churn Kyal*, *Talookdars*, as sureties, in addition to the above-mentioned *Bheem Chund Kyal* and *Sahoo Ram Kyal*; but the period prescribed by the order of 17th of *December* 1805, for perfecting the security, having then expired, no inquiry was directed by the Zillah Court into the sufficiency of the sureties thus tendered, but a copy of the proceedings was transmitted to the Provincial Court.

On the 27th *February* 1806, the Judges of the Provincial Court of Appeal passed the following order:— "That whichsoever of the parties shall, before the 21st of *March* instant, give sufficient security, such party shall obtain entry on the contested *Zemindary*; and if neither, then from and after the above period, the said *Zemindary* shall be delivered over to Government."

Under this order, *Motee Lal* tendered the security-bond of the present Appellant, *Rajah Gopal Inder*

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Narain, and an entry thereof upon the proceedings of the Zillah Court was made in the following terms:— "Security in property for the Respondent, in appeal to the *Calcutta* Court, signed and sealed on the 16th *February* 1806, being the security for one year's produce of the contested *Zemindary*, and for all other costs which may be decreed against *Motee Lal* in this appeal." It was accordingly referred to the *Nazir* of the Court to inquire into the sufficiency of the proposed security; and he having made his report, the Zillah Judge, on the 11th of *March*, accepted the same.

It appeared, however, that for the purpose of proving further the sufficiency of the security, the attornies of *Motee Lal*, on the 17th of *March*, entered in the Zillah Court two statements of the effects of the present Appellant, *Gopal Inder Narain*, with the signature of the Zillah Judge, within the period prescribed by the precept of the 27th *February* 1806; but the acceptance of the security of *Gopal Inder Narain* having been already recorded, it was deemed unnecessary by the Zillah Court to inform the Provincial Court of the presentation of those papers, which were merely placed in the Record Office.

On the 18th, an account of the acceptance of *Gopal Inder Narain's* security was forwarded to the Judges of the Provincial Court. No inquiry was considered necessary by the Zillah Court, with respect to the sufficiency of the further securities which had been tendered by the attornies of *Motee Lal* on the 17th of *March* 1806.

But on the same day, the Respondent, *Motee Hura*, presented a petition to the Provincial Court, complaining of the insufficiency of the security which had

been tendered on behalf of the Plaintiff, *Motee Lal.* This petition was accompanied by a copy of the proceedings of the Zillah Court, accepting the security of the present Appellant, and the *Nazir's* report, on which the Zillah Court had proceeded.

On this petition the Provincial Court pronounced *Gopal Inder Narain's* security insufficient, and made the following order, dated the 19th of *March* 1806:—

"That a copy of these proceedings, containing a precept, be sent to the Zillah Judge of *Midnapore.* Should the Appellant, *Motee Hura,* presently give good security, the said Judge should cause her to enter on the contested *Zemindary*; and if she cannot, in conformity with the order of the 27th of last month (*February*), the *Zemindary* should be delivered in charge to Government, and the return should be forwarded on or before the 15th of *April.*"

At the time of making the above order, no return had arrived at the Provincial Court, to the order of the 27th of *February*, and that Court was not only uninformed that any other person besides the Appellant, *Gopal Inder Narain,* was willing to become security on behalf of *Motee Lal,* but was also ignorant of the further evidence of the sufficiency of the Appellant's security contained in the two statements which had been presented to the Zillah Court on the 17th of *March,* and which were merely recorded in that Court.

On the 22nd *March,* the Provincial Court sent an order to the Zillah Judge, to examine the security in property offered by *Motee Hura.*

In consequence of the order of the Provincial Court of the 19th *March,* rejecting the security of *Gopal Inder Narain,* and directing the ouster of *Motee Lal,*

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from the *Zemindary*, the Zillah Court of *Midnapore* held proceedings on the 7th *April* 1806, wherein, after considering the various circumstances above stated, they set forth, that it seemed to them proper to send the statements above mentioned to the Provincial Court, since *Gopal Inder Narain* had been accepted as sufficient for the security required, and after making a special return of the amount of the property of *Gopal Inder Narain*, concluded with an order, that a copy of the proceedings, with copies of the statements of effects of *Gopal Inder* and *Bheem Chund Kyal* and *Sahoo Ram Kyal*, should be transmitted, for the information of the Court of Appeal, with a request for instructions, whether the Respondent, (*Motee Lal*) should be ousted from the *Zemindary*, or in case he should not be, whether the security of the *Kyals* should be taken; and whether, with the exception of the sureties above named, any other landholder, whose land may have been legally claimed, should be received as security.

Subsequent to the date of this order of the Zillah Court, and before the 13th of *May* 1806, some proceedings took place with reference to the security offered by *Motee Hura*, the Defendant in the cause; the sufficiency of which was ascertained: but the Defendant, *Motee Hura*, was not put into possession of the *Zemindary*.

On the 13th *May* 1806, the Provincial Court took the return of the Zillah Court of the 7th *April* into consideration; and after stating that it appeared that the holders of rent-free land, besides the present Appellant, *Gopal Inder Narain*, were sufficient according to the inquiry and account of the Zillah Judge and the two last orders, and declaring that the

suit would be proceeded in, within the period of two weeks, observed, " At this time it is not right that any order should be given for ousting the Respondent (*Motee Lal*), who is in possession, or for changing his security, which the Zillah Judge has pronounced sufficient; because the security of the Appellant (*Motee Hura*) is also thought sufficient, especially as the year current in the *Zillah* is near its close." It was therefore ordered, that the returns and other papers should be recorded, and a copy of the proceedings given to both parties.

The original appeal from the decree of the Zillah Court of the 18th *July* 1805, came on to be heard before the Provincial Court of Appeal, on the 3rd *July* 1806, when the Court reversed the judgment of the Zillah Court, and decreed that the Plaintiff, *Motee Lal*, after paying the expenses of collection, should deliver over the sum of one hundred and seven thousand rupees, the profits of the year 1213 *Amli* (1805-6), to the Appellant (*Motee Hura*), and should pay the costs of appeal as well as those of the Zillah.

On the 24th of *July*, the Defendant, *Motee Hura*, petitioned for execution of the above Decree, but the Court made no order.

Motee Lal having appealed to the Sudder Dewanny Adawlut, the *Calcutta* Provincial Court of Appeal directed their *Nazir* to inquire into the sufficiency of the securities tendered by *Motee Lal* for the period of his whole possession, pending the appeal; and the *Nazir* having reported against the sufficiency of such securities, the Court, on 21st of *August* 1806, ordered the property in dispute to be made over to the Collector, which order was, on the 27th of the same

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month, approved and confirmed by the Sudder Dewanny Adawlut.

On the 9th *September* 1806, *Gopal Inder Narain* applied by petition to the Provincial Court of Appeal, alleging that the security-bond entered in the Zillah Court by him was not deemed sufficient by the Judges of that Court; but that as he had not received the security from the office, he prayed that a copy of the proceedings of the Court of Appeal of 19th *March*, the 13th *May*, and the 29th *July*, containing as he alleged an opinion of the insufficiency of the security tendered by him, might be granted to him; the Court, however, refused to make any order without instructions from the Sudder.

On the 1st of *October* 1806, *Motee Lal* having presented a petition to the Sudder Court, praying that the security of *Gopal Inder Narain* might be declared sufficient, and received, for staying the execution of the Decree of 27th of *August*, that Court referred the petition to the Provincial Court, and ordered, that in case of the non-acceptance of the security, the Judges should forward to the Sudder Court a detailed account of the reasons for the same, together with the papers of the appeal in the suit, for the information of the Court.

Notwithstanding the last-mentioned order, *Gopal Inder Narain* petitioned the Sudder to be discharged altogether from his responsibility; but the Court having on the 26th *November* taken the petition into consideration, determined that, as nothing was required from the petitioner respecting the execution of the Decree, no order concerning his security was necessary.

On the 2nd of *March* 1807, the whole proceedings relative to the security of the present Appellant, *Gopal Inder Narain*, were taken into consideration by the Sudder Court; when having examined the various petitions and orders in the Zillah and Provincial Courts relative thereto, and the reason on which the present Appellant grounded his application to be discharged from his liability, namely, the alleged non-acceptance of his security in the Provincial Court; the Sudder Dewanny Adawlut declared that the excuse of the present Appellant was neither satisfactory nor proper to be admitted, and they directed that, in case of not obtaining from *Motee Lal* himself the amount of the profit determined by the Provincial Court against him, it might be demanded conformably to custom, and according to the security-bond, from the Appellant, *Gopal Inder Narain*, and the other five sureties of *Motee Lal*.

The Zillah Court, however, suspended the execution of the order of the Sudder Court on account of the *Kyals* having executed no security-bond, and by a proceeding held on the 28th of *March* 1807, they applied to the Provincial Court for further instructions. *Gopal Inder Narain* also petitioned the Sudder Dewanny Adawlut to be discharged from his security, on the ground that the Provincial Court had rejected it.

On the 13th *April* 1807, the Sudder Court, in reply to the last-mentioned petition, ordered that the petitioner should exhibit a copy of the proceedings of the Provincial Court, containing the order upon the contents of the proceedings of the Zillah Court on the 28th *March* 1806, which having been complied with, the Sudder Court took the same, with the last-

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mentioned petition of *Gopal Inder Narain*, into consideration, and declared, "that, from the proceedings exhibited this day, there results no sort of reason for changing the former order: no new order is required."

Previous to any further proceedings taking place, *Motee Hura* died, leaving *Jagarnath Gurg*, the present Respondent, her son-in-law and heir, who was afterwards duly admitted to defend the suit.

On the 20th *November* 1807, the Appeal in the original suit came on before the Sudder Dewanny Adawlut, when that Court confirmed the decree of the Provincial Court of Appeal, whereby the original Decree of the Zillah Court had been reversed, and directed the costs of both parties to be paid by *Motee Lal*. Upon this Decree *Gopal Inder Narain* again petitioned the Sudder Court to be released from his liability: but on the 6th of *January* 1808, the Court declared, "that since the unsatisfactory excuses of the petitioner concerning his security in this suit were rejected on the 2nd of *March* 1807, as is detailed in the proceedings of the above date, it was therefore ordered, that the prayer of the petitioner be rejected."

Gopal Inder Narain was then arrested and imprisoned on account of his security-bond; but having subsequently paid the sum of ninety-eight thousand nine hundred and eighty rupees, the amount of the profits of the estate for one year, after deducting the expenses, he obtained an order from the Provincial Court of Appeal on the 28th of *March* 1808, for his discharge.

Motee Lal appealed from the Decree of the Sudder Court of the 20th of *November* 1807, to his late

Majesty in Council; but having entered into a compromise, and agreed to withdraw the same, and having signed an instrument to that effect, he petitioned the Zillah Court of *Mysadil* to allow the same, which, after a personal examination of the Appellant, was on the 7th of *September* 1808 allowed, and ordered to be transmitted to the Sudder Dewanny Adawlut.

Upon *Motee Lal* relinquishing his appeal, the present Appellant, *Gopal Inder Narain*, again petitioned the Sudder Court, praying that he might obtain back the money which he had paid on account of his security for *Motee Lal*; the Court, however, declined entering again into a consideration of his case, but observed, that since he had paid the amount of security for execution of the Decree of the Zillah Court on account of the reversal of the Zillah Decree by the Decrees of the Provincial Court, and of that (the Sudder) Court, it was competent to him to appeal to *England* in the suit, if he thought such appeal advantageous to himself.

In pursuance of this order, the present Appellant appealed to his late Majesty in Council against the orders made as aforesaid, in relation to his security, praying that it might be reversed or varied, for the following reasons:—

I. Because, as matter of fact, it was not upon the Appellant's security that *Motee Lal* was allowed to retain possession of the property during the year 1806-7.

II. Because the rejection by the Court of the Appellant's suretyship, prevented him from obtaining from *Motee Lal* the counter-security for which he had contracted, and thereby altered his situation as a surety.

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III. Because the rejection of the security of the Appellant, by the order of the 19th of *March* 1806, rendered the security-bond thenceforward null and void, and the same could not be again revived against the Appellant, by proceedings to which he was not a party.

IV. Because the order of the Sudder Adawlut, dated the 2nd of *March* 1807, which proceeded from the assumption that the security tendered by the Appellant was void, if unaccompanied with that of the *Kyals*, yet being accompanied by the security of the latter it became binding, is erroneous, inasmuch as it is not the fact that the *Kyals* ever became sureties in the matter in question.

V. Because *Motee Hura*, through whom the Respondent claims, being the other party in the cause, for whose benefit the security was to be taken, formally objected to the acceptance of the bond tendered by the Appellant; and the Court having rejected it, upon her motion, the Respondent was thereby debarred from afterwards insisting upon it, as a valid security against the Appellant.

VI. Because the compromise of the matters in dispute between *Motee Lal* and the Respondent having been effected without the consent of the Appellant, must (even if he had become a surety) have operated to discharge him from liability, and entitled him to recover the amount which he had been compelled to pay.

The Respondent, on the other hand, contended that the Appeal ought to be dismissed; and in support thereof relied on the following reasons:—

I. Because, notwithstanding the order of the Provincial Court of Appeal of the 19th of *March* 1806,

pronouncing the security of the Appellant insufficient, yet upon the whole proceedings it is manifest that the acceptance of the Appellant's security by the Zillah Judge was in substance and effect undisturbed.

II. Because *Motee Lal* was allowed to remain in possession of the *Zemindary* in dispute upon the faith and credit of the security entered into by the Appellant, and the whole of the consideration having been received, and the object attained for which the Appellant's security was given, it was not afterwards competent to him to dispute his liability under it.

III. Because if the Appellant was not legally liable upon the security-bond, he ought to have resisted the payment thereof upon his alleged legal grounds of defence; whereas being taken and imprisoned in execution, he paid the money and was discharged, and the rejection, by the Sudder Dewanny Adawlut, of his summary, and, as it seems, *ex parte* applications for relief after such payment, cannot be the subject of appeal.

Mr. *Miller*, Q. C., Mr. *Wigram*, Q. C., and Mr. *Jackson*, for the Appellants,

Relied on the grounds set forth in their reasons, and cited *O'Neil* v. *The Bank of Ireland.**

Mr. Sergeant *Spankie*, Mr. *E. J. Lloyd*, and Mr. *Edmund F. Moore*, for the Respondent.

Lord BROUGHAM:

11 Dec. 1839.

The question in this case, which was argued fully before their Lordships, was whether a security given by *Gopal Inder Narain*, in the case of *Rajah Motee Lal* v. *Juggernath Gurg*, must be held to be still subsisting

* 3 Bligh, N. S. 24.

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as it has been decided to be in the Courts below or not. The ground upon which it is denied to be a subsisting security is, that in the case of *Motee Lal* v. *Motee Hura*, *Gopal Inder Narain* had tendered a security; which (be it observed in passing, is not immaterial to the case,) was tendered by him originally alone, and upon the supposition that he was to stand as the single security, without any co-obligor, but which had never been accepted; and that the whole proceedings taken together in the Zillah Court and the Provincial Court, by way of Appeal, and subsequently in the Zillah Court, and again in the Provincial Court, do not amount to an acceptance of that security.

Now we are all of opinion, that if these proceedings be considered, they are manifestly and undeniably an acceptance of the security, or at least that the security does subsist, as fully as if that difficulty, which alone is said to encumber the case, with respect to the existence of the securityship never had been interposed by the order made in the *Calcutta* Provincial Court of Appeal, on the 19th of *March* 1806. It becomes only necessary, in order to support this proposition, upon which the judgment below must have rested, and upon which our affirmance of that judgment proceeds, to state what those proceedings were.

It appears that the Zillah Court, upon a reference to its *Nazir*, the proper officer (as we should refer it here to the Master), and upon his report, accepted the security of *Gopal Inder Narain* as sufficient. When the Provincial Court came afterwards to deal with the case, on the 19th of *March* 1806, they made an order, proceeding upon reasons into the soundness or validity of which it is unnecessary to inquire, but coming to the conclusion that the security of the said surety was

not valid, they ordered "That a copy of the proceedings, containing a precept, be sent to the Zillah Judge of *Midnapore*," and having displaced, as it is contended, *Gopal Inder Narain's* security, the Court added, "Should the Appellant, *Motee Hura*, presently give good security, the said Judge should cause her to enter on the contested *Zemindary*, and if she cannot, in conformity with the order of the 27th of last month, the *Zemindary* should be delivered in charge to Government, and the return should be forwarded on or before the 15th of *April*."

Now admitting for the present that, without which the whole argument of the Appellant in this case fails, admitting that this is tantamount to an order rejecting the acceptance of the security which had been accepted by the Zillah Court below, admitting that, without which I say this appeal cannot stand for a moment, then observe what follows. It was referred back, according to that order, to the Zillah Court, when the Zillah Court respectfully, but distinctly, suggests to the Provincial Court a circumstance which appeared to the Zillah Court to have escaped the attention of the Provincial Court, namely, that the acceptance of the security of *Gopal Inder Narain* had been already recorded, and therefore it appears unnecessary (this is the delicate form of expression they use out of respect to the Provincial Court) that that security having been accepted, and its acceptance recorded, "It appears unnecessary to inform the Provincial Court of the presentation of these papers, because they were placed in the Record Office. Now an order has been issued by the said Court for rejecting the security of the said *Gopal Inder Narain*: it therefore seems proper to send the statements above men-

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tioned, since *Gopal Inder Narain, Zemindar*, has been accepted as sufficient for this security."

Upon this the matter returns to the Provincial Court once more, and then what is done by the Provincial Court? We do not say that what took place on the 13th of *May* 1806 amounts to a distinct reversal of the order of the 19th of *March* of the same year, which is the substratum of the Appellant's whole argument; we do not say that what was done on this 13th of *May* 1806 amounts to an order rescinding the former order, which stated the invalidity, by which it must be supposed to be meant, according to the scope of the Appellant's argument, the insufficiency of *Gopal Inder Narain's* suretyship; we do not say that therefore it was an order retracing the former altogether, and accepting the security which at first they had refused. But we say, at least it so far retraces the steps taken by the order of the 19th of *March* as to show that the Provincial Court was not dissatisfied with the order made by the Zillah Court, either in the second instance, when they remitted it to the Zillah Court, or in the first instance, when the Zillah Court accepted the security of *Gopal Inder Narain*: for recollect what the Court had done on the 19th of March. It said that *Gopal Inder Narain's* security was insufficient, and that therefore it should be referred to the Zillah Court with that order, and that *Motee Hura* should be caused to enter on the contested *Zemindary* if she should give good security. But observe what they do on the 13th of *May* 1806. They say, "At this time it is not right that any order should be given for ousting the Respondent, who is in possession, or for changing his security, which the Zillah Judge has pronounced sufficient, because the security of the Appel-

lant is also thought sufficient." That is to say, *Gopal Inder Narain's* security plus the security of the five *Kyals*. Therefore what they then say is, Do not change the possession: let *Motee Lal* give whatever security he pleases or can give; do not change the possession because his security is pronounced to be sufficient, contrary to what we had originally thought on the 19th of *March*. What is that security? *Gopal Inder Narain* and the five *Kyals*.

Then comes the mode in which the Sudder Dewanny Adawlut deals with it, in which they say that, conformably to the custom and according to the security-bond, it may be demanded from *Gopal Inder Narain* and the other five securities, treating the whole six therefore as being a sufficient security. Now this clearly shows that all these Courts, not only the Zillah Court, not only the Sudder Adawlut, but the intermediate Court, the Provincial Court, upon whose supposed rejection and final rejection it must be contended that the security of *Gopal Inder Narain* never was accepted, it appears that that Court, as well as the other two, considered and dealt with *Gopal Inder Narain's* obligation as an existing and valid security. That appears clear, and then it was most accurately stated by the Zillah Court, and not denied by the Provincial Court, and further sanctioned by the final finding of the Sudder Dewanny Court, to be a security standing upon the record and never taken off the file, but subsisting upon the record.

Now one observation plainly arises upon this. Has not *Gopal Inder Narain*, supposing he has any case at all for being let off, mistaken his way altogether? Ought he not to have proceeded to have taken off the record, in order to have the argument of the Provin-

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cial Court admitted and sanctioned by the Sudder Adawlut? Ought he not to have taken that course instead of allowing it to stand on the record as subsisting, and then endeavouring to escape its obligation by the argument to which I am next to refer, namely, that true it is it subsists,—that true it is therefore that here is a subsisting and valid security given by him, and which may stand alone, and which is not joint but several, which is not conditional upon other persons, either five or one, or any of the *Kyals* joining in the security. But that inasmuch as he, the Appellant, acted upon the supposition that he was to be joined with the other five, and that the Courts acted upon a supposition that the other five were joined with him, they did not accept him alone, but accepted him in conjunction with those other five.

First, then, it is said that he, *Gopal Inder Narain*, himself considered that he was only bound in the event of the other five being bound. Of what avail is it what a person considers who gives an obligation? You are to look at what he does, not to what he thinks. You are to gather what he means from what he has said in his instrument, not from what he suggests. Now in order to escape the obligation of that instrument, you are to look to his obligation, which he has contracted in point of fact and in point of law, an obligation which is binding upon him, not to the intention, and motives, and expectation, and speculation, which he may have had in his own mind at the time he so bound himself. If he really had intended only, and meant only to bind himself in this cause, upon the supposition of his being bound together with the five *Kyals*, he ought to have framed the security in a perfectly different manner. He ought to have made it

a joint security with those five *Kyals*, which would have given him his remedy against them, and he ought to have made it conditional upon those five *Kyals* becoming a subsisting security together with himself. He has done no such thing, and it must further be remarked, that he originally, (which cuts even that little ground from under his feet as to what his views and intentions were,) that he originally tendered his security absolutely, singly and alone, and reckoned upon his being the only security in the cause, and it was received as such. But then the others were added for greater security. For whose benefit were the others added? Not for the benefit of *Gopal Inder Narain*, who had originally tendered himself alone, and, as so tendered, had been accepted —no such thing—but for the better security of the Plaintiff in the cause.

Then next, and lastly, it is said that the Court only accepted him conditionally, because they accepted him together with the other five. Now if the former view of the case was of little avail to the Appellant, this can be still less, because the Court have accepted him alone in point of fact. But we go further, and say that if the Court had accepted him with the other five, that would be immaterial for the purpose of this argument; for if they accepted him with the other five, and he bound himself unconditionally, without the other five, the Court accepted him according to his obligation;—they accept him as a separate security. They accept the other five as separate securities, and that acceptance is valid and effectual, and finished, and executed as to him, without the least regard to the other five, because it must be an acceptance in conformity to and according to the tenor of the whole

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obligation. It would be just as good an argument, just as solid a ground of escape, for *Gopal Inder Narain* to say, (and this applies to both parts of the case,) I gave my security, I tendered myself as a surety, upon the supposition that the other five *Kyals* were sufficient; if the five *Kyals* prove insufficient, therefore *cadet questio* as to me, for I never meant to bind myself upon that supposition, and *cadet questio* as to the Court, for they never meant to accept me upon that supposition. But can any thing be a greater absurdity than this? because this is the very case provided for. The reason why *Gopal Inder Narain's* security is taken, as well as the other five, is in case they should prove insufficient. So that, according to the scope of that argument, the very purpose for which *Gopal Inder Narain* is added to the five *Kyals*, namely, the possible insufficiency of the *Kyals*, would be set up as a reason for letting off *Gopal Inder Narain*. The very ground for taking *Gopal Inder Narain* being the possible insufficiency of the other five.

Upon the whole, therefore, their Lordships are clearly of opinion that this is a valid and subsisting security, and that this Appeal must be dismissed with costs.

KEERUT SING (Defendant in three Suits, consolidated in this Appeal) } *Appellant*,

AND

KOOLAHUL SING and Others (Plaintiffs in the said three Suits) - - } *Respondents.**

On Appeal from the Sudder Dewanny Adawlut of Bengal.

11th Dec. 1839.

THIS was an Appeal from the decision of the Sudder Dewanny Adawlut of *Bengal*† in three several causes, instituted by the descendants of *Rajah Kanik Chund*, for recovery, according to their respective interests, of the *Talook Belkhurrah*, in the *Pergunnas Urol* and *Mussoora*, in the district of *Benares*, which was in the possession of the Appellant, *Keerut Sing*, when the suits were instituted, and who was therefore the Defendant in each suit. The property in question originally belonged to *Rajah Kanik Chund*, who became possessed of it in 1716, by virtue of a *Jughire*

According to the Hindoo law, the widow, in default of issue, is entitled to succeed to the whole of her deceased husband's estate; but her title to such estate is only as tenant for life, and she has no power to alienate or devise any portion of her husband's estate which on her death devolves to his legal heirs.

* Present: Members of the *Judicial Committee*,—Lord Brougham, Mr. Justice Bosanquet, Sir Herbert Jenner, and the Right Hon. Dr. Lushington.

Privy Councillor,—*Assessor*, Sir Edward Hyde East, Bart.

† Reported 4 Macnagh. Sud. Dew. Reps. 9.

Where, therefore, a party claimed possession of a *raj*, by virtue of a *Wusseeyut-namah*, (or deed operating as a will,) from the widow of a deceased *Zemindar*, who died without issue, leaving collateral heirs, the Judicial Committee refused to decide on the validity of the instrument devising the *raj*, being of opinion that the *Ranee* (the widow) was incompetent by law to execute such an instrument to the prejudice of her deceased husband's heirs, and therefore affirmed the decree of the Court below with costs.

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Sunud. From him it descended, through three successive generations, to *Rajah Juswunt Sing*, who was the last *Rajah* seized, and who, dying without issue, was succeeded by the *Ranee*, his widow, who continued in possession till the period of her decease, which took place on the 26th of *October* 1818.

The Appellant, *Keerut Sing*, was the *Mokhtar** of the *Ranee*, and upon her decease took possession of the property in question, claiming to be at once the heir of *Rajah Juswunt Sing*, and also entitled, by virtue of a *Wusseeyut-namah*, or deed of gift, executed in his favour by the late *Ranee*. It appeared that he performed the funeral ceremonies, though a petition had been presented to the Criminal Court, immediately on the *Ranee's* decease, by one of the Respondents, claiming the right to perform them, as heir of the *Ranee*; and praying the Court to issue a *Perwannah* to the *Darogah*, or police magistrate, to station *Burkundazees*,† to prevent interruption and disturbance from the late *Ranee's* servants, and to protect her property by granting an attachment against it. The Court refused to order an attachment against the property, in the absence of a regular suit, being contrary to Regulation V. of 1799, but directed a *Perwannah* to issue to the *Darogah*, as prayed for.

In consequence of these adverse claims, the Registrar, pursuant to Regulation II. of 1816, reported to the Collector, that the *Zemindary* of the village of the *Pergunnas Mussoora* and *Urol*, appendant to the *Zillah Bahar*, the property, and late in the possession of the deceased *Rajah*, were entered in the Collector's office in the name of the deceased *Ranee*; that her heirs were

* Agent. † Matchlock-men.

Baboo Ghirdharee Sing (one of the Respondents), the heir of *Rajah Kulal Chund*, and *Koolahul Sing* (another of the Respondents), who were fourth in descent from *Rajah Juswunt Sing*. He also reported that the Appellant, *Keerut Sing*, stated that he held a *Wusseeyut-namah* from the *Ranee*, that while the *Ranee* was alive, he, the Collector, saw not, nor had ever seen or heard of any document or *Wusseeyut*, in favour of any person for the *raj*, which was in his possession, and that, according to the *Sastras*, the *Ranee* had not the power to make any *Wusseeyut*,* *Hibbanamah*,† or *Wusseeyut-namah*.‡

In consequence of this report, the Respondents, *Koolahul Sing* and *Ghirdharee Sing*, presented petitions to the Board of Commissioners of Revenue, to have their names entered in the office books of the Collector, as the hereditary proprietors of the villages late in the possession of the *Ranee*. But proceedings having been taken, by *Keerut Sing*, in the Provincial Court, to revoke an order for the attachment of the property, made by the Judge of the Civil Court, and to restore the possession to him, the Provincial Court removed the attachment, and ordered possession to be restored to *Keerut Sing*, with liberty for the Respondents to institute a regular suit against him, to determine the right of possession.

No order was made by the Board of Revenue on the petition of the Respondents, but, on the 20th of *December* 1821, *Koolahul Sing* filed his plaint against the Appellant, *Keerut Sing*, setting forth his title, by descent from the *Rajah*, and claiming a moiety of the

* Deed.

† Will, or deed of inheritance.

‡ Deed of gift.

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villages late in the possession of the *Ranee*, and impeaching both the legality and validity of the *Wusseeyut-namah* relied upon by the Appellant. To this the Appellant answered, insisting upon his title as heir, and under the above deed. The other Respondents (excepting *Ghirdharee Sing* and *Neemdharee Sing*, who instituted suits, on their own behalf, against *Keerut Sing*) intervened by petition in *Koolahul Sing's* suit, claiming to be co-sharers with him. Pending these proceedings, the Provincial Court, having issued a public proclamation for the heirs of the deceased *Ranee* to come in and present their claims, appointed a *Sarbarakar*, or receiver, to take charge of the villages left by the deceased *Ranee*, and then in the possession of the Appellant, *Keerut Sing*.

No documentary or other evidence was produced by the Plaintiff, *Koolahul Sing*, but numerous witnesses were examined, and documents produced, by *Ghirdharee Sing*, in whose suit the principal evidence was taken, and that cause being ripe for decision, answers were required from the Pundits of the Provincial Court to the following questions:—

"*Question.* The whole of the *Zemindary* having descended to *Rajah Juswunt Sing*, after having been previously held by several generations, and *Rajah Juswunt Sing* having died without children, leaving his wife as his heiress; if the said wife, by the execution of a *Wusseeyut-namah* (a will or testament), transfer the *Zemindary* to *Keerut Sing*, will such a transfer be legal according to the *Sastras* or not?"

"*Answer.* A Hindoo woman has not the power of granting property to another; if the woman referred to give the property referred to, to a near relation,

who may possess strong claims upon the property, still the transfer will be illegal without the consent of the heirs."

"*Question.* On an inspection of the papers of the suit and the genealogical table, it appears that the *Zemindary* in dispute first belonged to *Rajah Kanik Chund*, who obtained the title of *Rajah*; that he was succeeded by *Gundheeb Sing*, who was succeeded by *Bhurat Sing*, *Jugha Sing*, *Bahadur Sing*, and *Juswunt Sing*, one after the other, and all these persons have no heirs. On a perusal of the genealogical table, to whom does the *Zemindary* referred to belong, agreeably to the *Sastras*?"

"*Answer.* If *Rajah Bahadur Sing*, the father of *Juswunt Sing*, were the adopted son of *Rajah Gundheeb Sing*, the *Zemindary* in dispute will belong to the son of the daughter of *Gundheeb Sing*, or otherwise it will belong to the relatives who are descendants from the same stock, *viz.* to the children of the brethren of *Juswunt Sing*; if there are none, to the brethren of *Bahadur Sing* and *Jugha Sing*; if there are none, to the descendants of the brethren of *Gundheeb Sing*; and if there are none, to the descendants of the brethren of *Doolar Sing*."

Upon these opinions, and inspection of the genealogical tables, and the evidence filed in the suit, the Court was of opinion that the *Wusseeyut-namah* was illegal, and that the Defendant, *Keerut Sing*, had failed in proving his descent from *Doolar Sing*, through whom he claimed, and had, therefore, no interest or concern in the property in dispute, left by the *Ranee* of *Rajah Juswunt Sing*, whether on the ground of the *Wusseeyut-namah*, or by hereditary right.

In consequence of this opinion, the Court directed

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a *Perwannah* to be issued to the Government pleader, directing him to claim the *Zemindary*, as an escheat to the Government, which was accordingly issued on the 6th of February 1823, and a motion made thereon by the Government *Vakeel*, on the 12th of the same month, was entered, but no further proceedings had thereon.

On the 17th of February 1823, the Court having previously required the attendance of the *Pundit* of the City Court, with a view to clear up certain points connected with the *Sastras*, put the following further question :—

"In case *Rajah Kanik Chund*, who acquired the title of *Rajah*, and the *Zemindary*, had no begotten son of his own, and agreeably to the assertions of some of the heirs, in the first instance, *Kulal Chund*, and subsequently *Gundheeb Sing*, became the adopted sons of *Rajah Kanik Chund*, and both parties to the suit admit the adoption of *Gundheeb Sing*, and if *Kulal Chund*, referred to, adopt *Boodun Sing*, but the proofs of their adoption agreeably to the rules of the *Sastras* be not forthcoming, although both parties declare that the *Zemindary* descended from *Rajah Kanik Chund* to *Gundheeb Sing*, from him to *Bhurat Sing* and his wife, and to *Jugha Sing*, *Bahadur Sing*, *Bhugwunt Sing*, *Rajah Juswunt Sing* and the wife of *Juswunt Sing*, in regular succession, who held seizen of the whole property,—if all these persons die without issue, in such case, on a perusal of the genealogical table, to which particular heirs will the *Zemindary* referred to belong, agreeably to the *Sastras*?"

"*Answer.* If in the first instance *Kulal Chund*, and afterwards *Gundheeb Sing*, became the adopted sons of *Rajah Kanik Chund*, doubts arise in respect to the

adoption of the two, both according to the *Sastras*, and the tenor of the question above put; for if *Kulal Chund* became an adopted son, and he adopted *Boodun Sing*, in such case, according to the words of the *pothee** of *Deepuk Buhman*, *Kanik Chund* no longer possessed the option of adopting *Gundheeb Sing*. However, admitting that he had the option, then the others would not have obtained possession of his *Zemindary*. Again, the fact of *Gundheeb Sing* having been adopted according to the rules prescribed by the *Sastras*, is not ascertainable, and it were not possible, in case he were adopted, and if he adopted *Bahadur Sing*, for *Bhural Sing* and others named in the question above propounded to have obtained possession, consequently confidence cannot be placed in the assertion of their adoption. It however appears, from the fact of their having had possession, that *Rajah Kanik Chund* appointed *Gundheeb Sing* to be the managing officer and superintendent of the *Zemindary* affairs; accordingly, agreeably to the text *Yagnyawalkya Muni* on the subject of seizen forthcoming in the *pothees* of the *Sanscrit* language, seizen is presumptive proof of proprietary right; and according to another text of the same *Muni*, contained in the same *pothee*, in abstract as follows:—'A person dying without male issue, his wife, or if he have no wife, his daughter, or if he have no daughter alive, the son of such daughter, will become the proprietress or proprietor of all his property, both real and personal; but if none of these persons are forthcoming, the mother of the deceased will obtain seizen; if there be no mother, his father; if the father be dead, the

* Book.

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'uterine and full brothers of the deceased; and if 'there be no brother, the sons of such brother will 'succeed as proprietors to the property; if there be no 'son of a brother, it will belong to the paternal grand-'mother, and then to the grandfather and their sons, 'and in this way to the preceding eight generations.' The real and personal property of the wife of *Rajah Juswunt Sing* belongs to *Ajeeb Sing*, the fifth generation preceding *Juswunt Sing*, and in right of him, his heirs will succeed to the property."

On the 19th of *February* 1823 the Provincial Court of *Patna* made their Decree in this suit, rejecting the *Wusseeyut-namah* of the Appellant *Keerut Sing*, and also his claim as heir of the deceased *Ranee*, and awarding eight anas or one moiety to the descendants of *Mya Ram*, the son of *Boodun Sing*, in the proportion of two ana or sixteenth parts to the Plaintiff *Ghirdharee Sing*, *Neemdharee Sing*, *Doorghul Sing*, and *Dhur Sing*, and the other moiety or eight ana shares to the descenddants of *Doolut Sing*, *viz.*, four ana shares to *Duryas Sing* and *Puhulwan Sing*, and four ana shares to *Koolahul Sing*, *Hurman Sing* and others, the heirs of *Mungal Dutt*.

Similar Decrees were pronounced on the same day, in the other two suits instituted by *Koolahul Sing* and *Neemdharee Sing*.

Keerut Sing being dissatisfied with these Decrees, appealed to the Sudder Court, but the Court were of opinion that no grounds existed for reversing the decisions of the Provincial Court, which were ordered to be maintained and affirmed, and the several appeals dismissed with costs.

The Appellant, being desirous of presenting an Appeal to Her Majesty in Council, from each of these

Decrees, applied to the Sudder Court for their admission and consolidation, which that Court, adverting to the circumstance of the Appellant being Defendant in all three suits, and that they had reference to one property, permitted, notwithstanding that, pursuant to the provisions of Regulation XVI., 1797, s. 3, two of them were not severally appealable to *England*.

The Appellant now prayed for the reversal of these Decrees, for the following reasons :—

I. Because the *Ranee*, as heiress of *Rajah Juswunt Sing*, was absolute owner of the property in question, with power to alienate the same, and because the *Ranee*, by the *Wusseeyut* or instrument under which the Appellant claims, (the validity of which was fully established,) gave the property to the Appellant.

II. Because the *Ranee* of *Juswunt Sing*, if not entitled to the property in question as his heiress, held the same adversely against all persons in unqualified and absolute ownership for eighteen years, whereby the claim of the heirs of *Rajah Juswunt Sing*, (if any such heirs existed) became barred.

III. Because the Respondents were not the heirs of *Rajah Juswunt Sing*, and having no title themselves, could not be admitted to contest the title of the Appellant or disturb his possession.

On the part of the Respondent it was submitted that the Decrees of the Sudder Adawlut ought to be affirmed for the following reasons :—

I. Because the *Wusseeyut-namah* adduced by the Appellant was an instrument fabricated by the Appellant, or if not fabricated, was an instrument the *Ranee* was incompetent to make, and the alleged title of the Appellant by descent was wholly unfounded.

II. Because the title of the Respondents, as co-

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heirs or successors to the deceased *Ranee* was fully established.

Mr. *Miller*, Q.C., Mr. *Wigram*, Q.C., and Mr. *Jackson*, for the Appellant.

Mr. *Serjeant Spankie*, Mr. *E. J. Lloyd*, and Mr. *Edmund Moore*, for the Respondents.

The Right Honourable Dr. LUSHINGTON:

July 10th, 1840.

This Appeal is preferred against three Decrees of the Court of Sudder Adawlut, bearing date the 19th of *January* 1825, confirming three Decrees made by the Provincial Court of *Patna* on the 19th day of *February* 1823. The property involved in these suits appears to be very considerable, and, on the death of the last possessor, the *Ranee*, the widow of *Juswunt Sing*, became the subject of litigation, and gave rise to the three suits already mentioned.

It is not necessary to enter into the particulars of these suits, further than to say that the Respondents claim, in various proportions, the whole property, as heirs of the *Rajah* last in possession.

The present Appellant, *Keerut Sing*, claims this *Zemindary* upon several grounds. First, by virtue of a *Wusseeyut-namah*, or deed, from the *Ranee*, the widow of the *Rajah Juswunt Sing*, the last proprietor, who died in possession of the property. This deed bears date the 5th of *July* 1813, the *Ranee* having died herself on the 26th of *October* 1818. Secondly, the Appellant alleges himself to be a relation of the late *Rajah*, though not, as admitted at the Bar, the nearest relative. Thirdly, he claims as in possession, denying that the Respondents, the Plaintiffs in the Courts below, have made out their title. Both Courts have

pronounced against his claims, and in favour of the Respondents'.

It may be expedient, in the first instance, to examine his title under the alleged deed, because, if the deed were validly executed, by a person having a legal authority so to dispose of the property, all other questions would be unnecessary, and in considering the title preferred under the deed, the power of the *Ranee* so to dispose of the property is obviously the first consideration, for if that question be determined in the negative, none can arise as to the execution.

Then as to the power of the *Ranee* to dispose of the property, assuming *Keerut Sing* to be a near relation of her deceased husband, this question was put by the Court to the *Pundits*, and answered decidedly in the negative.

There does not appear to be the least reason to doubt that this answer is a true exposition of the law which must govern the claims of all parties to the property. It is in conformity with the law as laid down and acted upon in former cases.*

This doctrine too is recognized by the Judge of the Provincial Court, and also in his judgment of the 19th of *February* 1823, and this Decree is affirmed by the Judge of the Sudder Dewanny Adawlut, on the 19th of *January* 1825, but without stating the law particularly.

As we are all of opinion that the law has been correctly laid down, and that the *Ranee* had no power to execute a deed of this tenor, all title on behalf of the Appellant, as founded on this deed, necessarily falls to the ground; and in this view all questions as to

* Rajunder Narain Rae *v.* Bijai Govind Sing, ante 181 et 191.

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the execution of the deed require no consideration. But as a title, on the footing of possession, has been set up, we have not deemed it right wholly to pass by the question of execution.

Keerut Sing had been the *Mokhtar*, or general attorney, of the deceased *Ranee*, and employed confidentially by her. Many witnesses have been examined to prove the due execution of the deed, executed beyond all question, if executed at all, under most suspicious circumstances. We do not think we are called upon to pronounce the whole to be a forgery, neither, on the other hand, are we satisfied, on looking to the evidence and the discrepancies therein, that the whole proceeding was *bonâ fide*, so that the whole defect was the want of title in the grantor. We think that there is not sufficient ground for holding that the Appellant was a *bonâ fide* possessor by reason of this deed.

The Appellant further alleges that his possession should not be disturbed, by reason that the Respondents are not the right heirs. Now, first, as to his possession, the facts appear to be as follows:— The Appellant, being *Mokhtar*, as already stated, of the late *Ranee*, and resident with her on her death, on the 26th of *October* 1818, took possession of the property. The property was attached by Decree of the Judge of the city of *Patna*, on the 26th of *December* 1818, with permission to any of the parties to institute a suit in three months. In the month of *September* 1821, that Decree was reversed by the Provincial Court, and the Appellant restored to the possession of the property. Several suits were then instituted, and on the 14th of *June* 1822, the Provincial Court took charge of the property, by the appoint-

ment of a *Sarbarakar*. There was also a claim preferred, on behalf of the Government, for the property, as an escheat, but it does not appear that that claim was prosecuted. We are of opinion that this is not such a possession as can be regarded with any favourable eye. It is not necessary to say how it should be dealt with if there was no title at all in the Respondents. It is sufficient to observe that, though doubts may exist as to the proportion in which the claimants should share, we think the Decrees appealed from are right, to the extent that the Respondents, in some proportion or other, are entitled to the whole property. As against them collectively the Appellant has no right at all.

Under these circumstances we intend to affirm the Decrees of the Court below. There are in point of fact, it may be said, three Decrees of the Inferior Court, and three Decrees of the Superior Court, for all the suits seem to have been considered as one combined suit. Their Lordships think it right not only to affirm those Decrees appealed from, but also with costs. They do not think it necessary to enter more particularly into the evidence, inasmuch as they affirm these Decrees; but they are of opinion, looking at all the circumstances attending the taking the possession of this property, and the manner in which the deed is alleged to have been obtained, that it is their duty to affirm the Decrees with costs, and to discourage such attempts to take property from the right heirs by doubtful deeds of gift and erroneous assertions of heirship.

GHIRDHAREE SING - - - - *Appellant*,

AND

KOOLAHUL SING and Others - *Respondents*.*

On Appeal from the Sudder Dewanny Adawlut of Bengal.†

7th and 8th Dec. 1840.

A suit having been instituted by some of the descendants of a deceased *Rajah* for possession of his property, held under an alleged *Wusseeyut-namah*, or deed of gift, proclamation was made, by order of the Provincial Court, for all persons pretending to have any claim to the property in question to come in and prosecute the same; in pursuance of which, the present, with another suit, was instituted. The Provincial Court, being of opinion that the *Wusseeyut-namah* was not authentic, passed a Decree, declaring for the right of succession and inheritance to be among the several claimants, and, pursuant to Regulation III., 1793, s. 13, specified the shares to which they were respectively entitled. An Appeal was interposed to the Sudder, by one of the co-sharers, on the ground that the property was a *raj*, and indivisible, and ought to have been decreed to him, as nearest in descent from the *Rajah*, but no fresh evidence, respecting the nature of the property, or the claim of the entirety, as permitted by the practice of the Sudder Court, was produced. The Decree of the Provincial Court was affirmed by the Sudder, and, on appeal to Her Majesty in Council, the Judicial Committee upheld the decision of both Courts below, being of opinion that all parties knew, and acted on the knowledge, that the suits were not only to decide upon the claim under the *Wusseeyut-namah*, but to determine also what parties were entited to the property, the subject of the suit, and dismissed the Appeal with costs.

In reviewing proceedings of the Native Courts in *India*, where the Hindoo or Mahomedan law is the rule, and the form of pleading wholly different from that in use in Courts where the law of *England* prevails, the Judicial Committee will look to the essential justice of the case, without considering whether matters of form have been strictly attended to.

THE circumstances under which this appeal arose are fully detailed in the preceding case. The Appellant, *Ghirdharee Sing*, was dissatisfied with the mode of

* Present: Members of the *Judicial Committee*,—Lord Brougham, Mr. Justice Bosanquet, Mr. Justice Erskine, and the Right Honourable Dr. Lushington.

Privy Counsellor,—*Assessor*, Sir Edward Hyde East, Bart.

† Reported 4 Macnagh. Sud. Dew. Reps. 9.

distribution adopted by the Provincial and Sudder Decrees, and appealed to Her Majesty in Council, insisting that the Decree ought to be reversed or varied for the following reason :—

Because the property in dispute constituted a *raj*, which by law descends from ancestor to heir in succession, and because the Appellant was the eldest lineal descendant and heir of *Rajah Kanik Chund*, by whom the *raj* was first acquired.

The Respondents contended that the Decree was just and proper, and ought to be maintained for the following reasons :—

I. Because the claim of the Appellant to the whole of the *Zemindary* by *Rajah Juswunt Sing*, on the ground of the same constituting a *raj*, was untenable, and contrary to the *Bewustas* of the *Pundits*.

II. Because the Appellant, as one of the descendants of *Mya Ram*, the son of *Boodar Sing*, was, according to the same *Bewusta*, only entitled to a two-ana or eighth share, the remainder being divisible in manner and among the parties mentioned in the Decree of the Provincial Court.

Mr. *Miller*, Q. C., Mr. *Wigram*, Q. C., and Mr. *Jackson*, for the Appellant,

Urged the reason above given, and insisted that the Decrees pronounced by the Provincial Court at *Patna*, and the Sudder Adawlut, declaring the Respondents to be respectively entitled, on a division of the *raj*, to the shares above declared, could not be maintained, as there had been no issue between the Appellant, *Ghirdharee Sing*, and the Respondents, the parties to the present appeal; that the only question which had been

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actually in issue was, whether *Keerut Sing* was entitled to the *raj*, by virtue of the *Wusseeyut-namah*, and that their claims not having been put in issue in the suit, the Decree could not stand. *Trimleston* v. *Lloyd.** They further insisted that by the course taken by both the Provincial Court and the Sudder, the Appellant was prevented from producing evidence to establish his claim as sole heir to the *raj*. They also cited and referred to *Strange's Hindoo Law*, vol. i. 175, and Regulation XI. of 1793.

Mr. Sergeant *Spankie*, Mr. *E. J. Lloyd*, and Mr. *Edmund Moore*, for the Respondents,

Submitted that it was notorious that all parties knew, and acted upon the knowledge, that the suits were not only to decide the claims of *Keerut Sing*, but also to determine how and in what proportions the parties claiming were entitled, as heirs of the deceased *Rajah*, to the succession of the *raj*; that this was apparent from the fact of the proclamation for the heirs to come in, which was in conformity to sect. 13, Regulation III., of 1793; that the claim now set up was evidently an after-thought of the Appellant's, as no mention had been made till after the Decree, giving the Appellant, *Ghirdharee Sing*, a two-ana share only in the succession of the property, being a *raj* and indivisible; it was also remarkable that this objection had not been taken in the Appellant's case. They argued also that the second objection was untenable, inasmuch as *Ghirdharee Sing*, when he appealed from the Provincial Court, might have produced evidence to establish his exclusive right to the *raj*, if he possessed any.

* 1 Bligh, N. S. 427.

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15 Feb. 1841.

The Right Honourable Dr. LUSHINGTON :

Rajah Juswunt Sing was the last male possessor of this property, which forms the subject of the present Appeal. He died in the year 1801. Upon his death, the *Ranee*, his widow, obtained possession, being entitled by law to a life estate. In *October* 1818, she also died, and then commenced the litigation which has produced the Appeal now to be decided.

Their Lordships have already disposed of another appeal relating to the same property, to the particular circumstances of which it will not be necessary to advert, though some of the facts must be stated to render the judgment now to be given more intelligible.

Upon the *Ranee's* death, several persons preferred claims to the property. *Keerut Sing* founded his title on an alleged *Wusseeyut-namah*, or deed of gift from the deceased *Ranee*, averring also that he was a near relation. He being *Mokhtar*, and resident with the *Ranee* at the time of her death, immediately took possession of her estate and property. Some of the other claimants having disputed *Keerut Sing's* right, upon which disturbances arose, the Judge of the City of *Patna*, by Decree dated the 26th of *December* 1818, attached the property, giving to any of the parties permission to bring a suit; but in *September* 1821, such Decree was reversed, and *Keerut Sing* again put in possession, the other claimants being left to their remedy by regular suit.

On the 20th of *December* 1821, *Koolahul Sing* filed his plaint in the Provincial Court of *Patna* against *Keerut Sing*, and in this proceeding he alleged that the hereditary right of succession to the property

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attached to the descendants of *Lal Sing*, his grandfather, and to the descendants of *Kulal Chund*, the grandfather of the grandfather of *Ghirdharee Sing*, in proportion of a moiety to each branch.

On the 31st of *December* in the same year 1821, *Ghirdharee Sing* filed his plaint against *Keerut Sing*, and therein he claimed the whole by descent, alleging also a *Wusseeyut-namah* made to him by the *Ranee*, transferring the property.

On the 23rd of *May* 1822, the suit of *Ghirdharee Sing* having been called before the Court, the Judge issued an order that proclamation should be made for all persons pretending to have any claim to the property of the deceased *Ranee*, to appear in six weeks, and prosecute their claims; such order purporting to be made in pursuance of section 13, Regulation III. of 1793.

On the 24th of *August* 1822, *Neemdharee Sing* filed his plaint against *Keerut Sing*, and therein he stated himself to be the younger brother of *Ghirdharee Sing*; he alleged, that according to the custom and rule of the family, the youngest brother ought to succeed to the *raj* and *musnud*, further averring, that if his claim on the ground of custom should be rejected, the property should be divided equally among the heirs. In those three suits each of the Plaintiffs produced documentary evidence; *Ghirdharee Sing* also examined witnesses. *Keerut Sing*, the Defendant, filed several documents, and examined some witnesses.

In *February* 1823, the Collector of *Bahar* filed a claim for the property on behalf of the Government, on the presumption that none of the claimants could establish a title. On the questions of law which arose

in the various suits, the Court took the opinion of the *Pundits*, and on the 19th of *February* 1823 proceeded to deliver judgment in all the three suits. By the Decrees then made, the Court pronounced against all pretensions of *Keerut Sing*, the Defendant, and divided the property into two parts, giving one part to the descendants of *Mya Ram*, the other to the descendants of *Doolab Sing*. The effect of this Decree was to give an eighth part of the whole to *Ghirdharee Sing*, another eighth to *Neemdharee Sing*, and one quarter to *Koolahul Sing* and others who were the heirs of *Mungul Dutt*.

From these Decrees there were four Appeals to the Sudder Dewanny Adawlut, three by *Keerut Sing* against each of the three original Plaintiffs, and one by *Ghirdharee Sing* against *Koolahul Sing* and others entitled to shares by the Decrees of the 19th of *February* 1823.

The Decrees were severally affirmed by the Sudder Dewanny Adawlut, the last of which forms the subject of the present appeal.

The first objection raised on behalf of the Appellant is, that, in the Court below, some of the questions which have been determined by the Decree were never put in issue, and that in consequence the Appellant is aggrieved, not by this omission only, but by being deprived of the opportunity of producing evidence material to support his case. But their Lordships are of opinion that this objection is in both respects void of any solid foundation. In reviewing the proceedings in *India*, whence the appeal is brought, the Courts where the Hindoo and Mahomedan Laws are the rule, and where the forms of pleading are

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wholly different from those in use in Courts where the law of *England* prevails, this Court must look to the essential justice of the case, without considering whether matters of form have been strictly attended to.

The objection is, that in the Court below the only questions really put in issue were whether *Keerut Sing*, the Appellant in the former Appeal, was entitled to the *raj* by virtue of the deed of gift, or otherwise, and that the claims of the parties to the present Appeal were not directly put in issue. But it is quite manifest from the whole course of the proceedings, that all parties well knew, and acted upon the knowledge, that the suits were not only to decide upon the claims of *Keerut Sing*, but to determine also what parties were entitled to the property the subject of the suit. The parties legally must be presumed to know the Regulations of the East India Company on this subject. But the case is not left to that presumption; for on the 23rd of *May* 1822, as has been already stated, the Court, in the very suit where the present Appellant was Plaintiff, directed, in conformity with section 13, Regulation III. of 1793, proclamation to be made for all persons to come in who had any claim to prefer to this property. It is wholly impossible therefore that the Appellant could be ignorant of the nature of the proceeding, nor do we find any objection raised by him until after the Decree had been pronounced, giving him but a small share of the property he claimed. Nor does the objection that the Appellant was prevented from adducing evidence which might have supported his case, stand upon any more solid foundation; for even supposing that he or his advisers la-

boured under any mistake whilst the proceedings were pending in the inferior Court, it is manifest that the Decree of the inferior Court at once brought the matter to their knowledge, from their own complaint, that when the cause got into the superior Court, the Sudder Dewanny Adawlut, they were well aware of all possible difficulties arising from any omission; and yet, though the Court is in the habit of receiving fresh evidence, and actually did receive it in this case, the Appellant, though in the petition of Appeal he has stated this as a ground of complaint, never petitioned the Court to admit any additional evidence, nor has at any time attempted to specify what evidence could be brought forward.

The objections then being of no weight, the points in the case are few and simple. It has been contended that this *raj* is an indivisible *raj*, and that the Appellant is, as heir, entitled to succeed to the whole. Now both the Courts below were of opinion that the evidence produced wholly failed to establish the position that this *raj* was indivisible, the *onus* of proof under the circumstances clearly lying upon the Appellant. The course of possession and enjoyment is most distinctly opposed to such a claim. The property had been held jointly, or, as it is termed in the judgment of the Court below, in coparcenary, and *Mya Ram*, through whom the Appellant makes his claim, had himself, upon a former occasion, set up a title to the property, entirely inconsistent with the judgment of the Court. Nay, even the Appellant himself, at the commencement of these proceedings, filed a document, in conjunction with the Respondent, setting forth a joint claim. Any claim, on the ground of

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adoption, falls to the ground, for nearly the same reasons, as well as for the defect of proof.

Under these circumstances, their Lordships are of opinion that the Appeal must be dismissed, with costs.

CASES IN THE PRIVY COUNCIL

ON APPEAL FROM THE EAST INDIES.

RICHARD HOWE COCKERELL, DWARKANANTH TAGORE, and ANSHOOTOSH DAY - - - - } *Appellants,*

AND

THEODORE DICKENS - - - *Respondent.**

On Appeal from the Supreme Court of Judicature at Fort William in Bengal.

Feb. 11th & 24th, 1840.

The principle that one creditor shall not take a part of the fund which otherwise would have been available for the payment of all the creditors, and at the same time be allowed to come in *pari passu* with the other creditors, for satisfaction out of the remainder of that fund, does not apply, where that creditor obtains by his diligence something which did not, and could not, form a part of that fund.

THIS was an Appeal from a judgment on the equity side of the Supreme Court of Judicature at *Fort*

The Orphan Chamber of *Batavia*, being the executors of a foreign creditor in the island of *Java*, by their agent in *Calcutta*, proved the amount of their whole debt against the estate of A. B., who had been declared insolvent under the Indian Insolvent Act, 9 *Geo.* IV., c. 73., and after making such proof, and receiving the dividends upon the whole debt, instituted a suit in the island of *Java*, to recover a plantation or estate there, held by one of the insolvents as trustee for the firm of A. B., and C. D., in equal shares; to which suit, the assignees of the insolvent appeared as Defendants, but judgment was given in favour of the creditor, and for the sale of the estate for his benefit; the proceeds of which amounted to three-fifths of his whole debt. The assignees of A. B., filed a bill on the equity side of the Supreme Court at *Calcutta*, against the agent of the foreign creditor, resident within the jurisdiction, praying that the dividends might be refunded, and that the Defendants might be restrained by injunction from receiving any further dividends, until all the other creditors were put on an equal footing with the creditor at *Java*, the Defendant demurred, and obtained judgment against the assignees. Held, on Appeal, by the Judicial Committee, that the estate in *Java*, not passing to the assignees under the assignment, did not form any part of the fund that was available for the benefit of the general creditors, and that the creditor was therefore not bound to refund the dividends, nor ought to be prevented from receiving any future dividends, provided he did not receive more than 20*s.* in the pound upon his whole debt.

But the bill having stated that the creditor had also instituted proceedings against certain debtors of the insolvents at *Bencoolen*; held, that the as-

* Present: Members of the *Judicial Committee*,—Mr. Baron Parke, Mr. Justice Bosanquet, Mr. Justice Erskine, and the Right Honourable Dr. Lushington.

Privy Councillor,—*Assessor*,—Sir Edward Hyde East, Bart.

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William in *Bengal*, in a suit in which the Appellants were Plaintiffs, and the Respondent the Defendant. The Appellants were the surviving assignees of the joint estate and effects of *John Palmer*, *George Alexander Prinsep*, *William Prinsep*, and *Charles Barber Palmer*, formerly of *Calcutta*, merchants and agents, trading under the firm of *Palmer* & Co., who in the year 1830 were declared insolvent, under the Indian Insolvent Act, 9 *Geo.* IV., c. 73.

The bill, which was filed on the 11th *January* 1837, stated, that the insolvents, on the 4th *January* 1830, duly filed their petition of insolvency in the Court established at *Calcutta* for relief of insolvents, and assigned and conveyed the whole of their estate and effects to the common assignee of the said Court, who by order of the Court afterwards duly assigned over the same to certain persons as special assignees, of whom some had since died, and others had been removed by order of the Court, leaving the Appellants, *Dwarkananth Tagore*, and *Anshootosh Day*, the only surviving and continuing assignees, and that the Appellant, *Richard Howe Cockerell*, had been subsequently appointed an assignee by order of the Court; whereby the whole of the estate and effects of the insolvent firm had become vested in the Appellants: that on the 22nd *January* 1836, *John Palmer* died; and that the surviving insolvents were afterwards, by two several orders of the Court, duly discharged from their debts. That the insolvents in due course filed

signees were entitled, under the prayer for general relief, to an injunction to stay the receipt of further dividends until the proceedings at *Bencoolen* were abandoned.

Under the prayer for general relief, specific relief may be granted of a different description from the specific relief prayed for by the bill; provided the bill contains charges, putting material facts in issue, which will sustain such relief.

the schedule of their debts and assets, and that amongst other claims set forth was a debt or sum of 2,52,460 sicca rupees, being the balance due from the insolvent firm to the estate of one *Gavorke Manuk*, (formerly an Armenian merchant, an inhabitant of *Batavia*, within the territories of the King of the *Netherlands*,) who died at *Batavia*, in the island of *Java*, on the 2nd *October* 1827, having made his Will according to the laws of that island, and constituted a certain public body or institution there (out of, and not subject to, the jurisdiction of the Court), called the Orphan Chamber of *Batavia*, executors and trustees of his Will. That the testator bequeathed the residue of his real and personal estate to his brother, *Malcum Manuk*, formerly of *Calcutta*, and since deceased, and in case of his death in the lifetime of the testator, to the heirs of the next of kin of the said *Malcum Manuk*.

The bill then proceeded to state, that *Gavorke Manuk* died possessed of very large property, sufficient to pay all his debts and legacies: that shortly after his death, and before the arrival of any authority or power from his executors, the Orphan Chamber, *James Wier Hogg*, the then registrar of the Supreme Court, on the 29th *January* 1828, obtained administration, with the Will annexed, to the goods of *Gavorke Manuk*, and got in effects of the testator within the jurisdiction of the Court to the amount of 4,84,000 rupees: that the Orphan Chamber being dissatisfied thereat, transmitted powers of attorney to the firm of *Palmer* & Co., empowering them jointly or severally to apply for administration of the goods of the testator. That *William Prinsep*, on the 28th *April* 1829, obtained accordingly such administration, with the Will annexed, and received from *Hogg*, the

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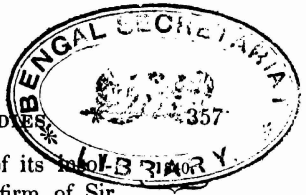
registrar, 1,85,147 rupees, 14 anas, 10 pice, part of the testator's estate, leaving in the hands of the registrar, 2,98,202 rupees, being the amount of several legacies directed in the Will to be paid into the hands of the ecclesiastical registrar for the time being. That *William Prinsep* entered into the administration of the estate, got in assets, and paid them into the hands of the firm of *Palmer* & Co. That at the date of filing the petition of insolvency, there was due to the estate of *Gavorke Manuk* from the firm of *Palmer* & Co., as such constituted agents, the said sum of 2,52,466 sicca rupees.

That *Malcum Manuk*, the sole residuary legatee, died on the 20th of *February* 1826, in the lifetime of the testator, leaving four sons and three daughters, infants under the age of twenty-one, who were Defendants in the suit.

The bill then stated, that after the insolvency of *Palmer* & Co., the letters of administration to Mr. *Prinsep* were cancelled; and that on the 23rd of *August* 1831, fresh letters of administration were granted to *J. W. Hogg*, with the Will annexed; and that afterwards the Defendant *Dickens* became, and then was, the sole personal representative of *Gavorke Manuk*, deceased, within the jurisdiction of the Supreme Court, and was in possession of assets amounting to 75,000 rupees.

That *Hogg*, on the 29th *August* 1831, received from the Plaintiffs, and their then co-assignees, a dividend of 5 per cent. on 2,52,466 sicca rupees, appearing in the schedule to be due from *Palmer* & Co. to *Gavorke Manuk*, amounting to 12,623 rupees; and that *Smoult* and *Dickens*, his successors in office, had received other dividends, which, inclusive of the dividend paid to *Hogg*, amounted to 71,793 rupees.



That the insolvent firm, at the time of its insolvency, was possessed, jointly with the firm of Sir *Charles Cockerell* & Co., of *London*, of the beneficial interest in a large plantation in the island of *Java*, purchased and carried on for account, and with the joint funds of the two firms of *Palmer* & Co., and *Cockerell* & Co., but in the sole name of *John Palmer*, for the joint benefit of the two firms in equal shares.

That the Plaintiffs directed their agents at *Batavia* (after the insolvency of *Palmer* & Co.) to take possession of the plantation, and dispose of it for the benefit of the creditors of the insolvent firm, and remit the proceeds to the assignees for distribution. That although the administrator at *Calcutta* had received dividends on a debt due from the insolvent there, the Orphan Chamber of *Batavia*, though apprised of the receipt of such dividends, did, on the 20th *March* 1833, cause a suit to be commenced in one of the Courts in the island of *Java*, against *John Palmer*, and caused the whole of the plantation and estate in *Java* to be sequestered for the debt of 2,52,462 rupees. That although the assignees appeared and defended the suit so instituted, the Court at *Batavia*, on the 25th *June* 1835, condemned *John Palmer* to pay the said debt of 2,52,460 rupees, with interest, and declared the plantation so sequestered to be liable to execution. That on appeal to the Supreme Court at *Batavia*, the Decree was affirmed, and on the 10th *March* 1836, the plantation was publicly sold, and the proceeds of sale, after expenses paid, amounting to about 1,50,134 rupees, were paid over to the Orphan Chamber, as executors of *Gavorke Manuk*. That this sum greatly exceeded the rateable dividend on the 2,52,460 rupees, and of all dividends which were likely to be declared.

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That process had been served also by the resident of *Bencoolen*, in the island of *Sumatra*, upon certain debtors to the estate of *Palmer* & Co., endeavouring thereby to enforce execution of the Decree of the Court of *Batavia* upon such debtors; whereby the Plaintiffs were unable to realize large sums due from such debtors.

That in consequence of the sale of the plantation in *Java*, towards satisfying the claim of the Orphan Chamber upon the insolvent firm, notwithstanding *Cockerell* & Co. were entitled to an equal share, and interest in the plantation, the firm of *Cockerell* & Co. had since claimed to prove against the insolvent estate 76,500 rupees, being the moiety of the value of the plantation.

That the Plaintiffs gave notice to *Dickens* of all these proceedings in *Batavia*, and requested him to refund the amount of dividends paid in *Calcutta*, being dividends on the debt for which the plantation had been sold, and the produce of which sale greatly exceeded the amount of such dividends. That *Dickens* and the representatives of *Malcum Manuk* were subject to the jurisdiction of the Court; but that the Orphan Chamber was not.

The bill prayed that the administrator might refund to the assignees the sums received by his predecessor and himself, and that the sum so refunded might be decreed applicable for the rateable benefit of the other creditors of the insolvents; that he might be restrained from receiving future dividends, until the other creditors of the firm had received dividends on their respective debts, proportionate to, and in like rate to the sum realized on the debt of 2,52,460 rupees by the sale in *Java*; and for such further and other relief as the nature of the case should require.

To this bill the Defendant, *Dickens*, demurred, first stating generally that the complainants had not made a case entitling them either to discovery or relief, then setting out special grounds of demurrer, as follows:—

1st. That it appeared by the bill that the public body called the Orphan Chamber of *Batavia*, were the executors of *Gavorke Manuk*, and, therefore, as far as assets belonging to his estate within the jurisdiction of the Supreme Court were concerned, the Orphan Chamber were bound by the laws applicable to the case within such jurisdiction, and also by the laws relating to insolvent debtors, which were in force in the city of *Calcutta*, as also by the acts of the late insolvent firm of *Palmer* & Co.; and who were shewn by the bill to have been the duly-constituted agents of the Orphan Chamber, and by which laws, and also by the acts of the late firm of *Palmer* & Co., as appearing by the bill, the Plaintiffs were not entitled to the relief prayed.

2nd. That it appeared by the bill, that the Court of Justice at *Batavia* was a foreign Court of Law, beyond the jurisdiction of the Supreme Court, and not recognizing nor bound by the law which such Court administers; yet that the said bill sought relief by reason of the decision of the Court of *Batavia*, over which decision the Supreme Court had no control.

3rd. That the Plaintiffs, by their bill, sought to make the estate of *Gavorke Manuk*, then in the hands of the Defendant, liable to pay a debt or claim of the firm of Sir *Charles Cockerell* & Co. against the Plaintiffs; which, by the Plaintiffs' own showing, appeared to be a claim disputed by themselves.

4th. That it appeared by the bill, that the Orphan Chamber, through their attornies, obtained from the

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Court at *Calcutta*, administration of the goods of *Gavorke Manuk*, deceased, and thereby submitted to the laws and jurisdiction of such Court in regard to such goods; yet that the Plaintiffs, as the assignees of *Palmer* & Co., sought by their bill to call in question such submission on the part of the Orphan Chamber.

5th. That it appeared by the bill, that the Orphan Chamber refused to recognize the validity of the law and practice of the Court at *Calcutta*, applicable to the administration of the effects of *Gavorke Manuk*, which were within the jurisdiction of such Court, and thereby prevented any equitable adjustment of accounts with the Orphan Chamber.

The demurrer was argued on the 13th *November* 1837, and the Supreme Court, having taken time to deliberate, pronounced judgment on the 2nd *March* 1838, allowing the demurrer, and dismissing the bill.

From this judgment the Plaintiffs appealed to her Majesty in Council, submitting that the judgment ought to be reversed, and the demurrer overruled, for the following reasons:—

I. Because it is contrary to the rules and principles which regulate the distribution of the property of bankrupts and insolvent debtors amongst their creditors, to permit any such creditor, having no special security or lien for his debt, to enforce payment thereof out of property from which the other creditors are excluded, and also in respect of the same debt to participate in competition with such other creditors in the general assets, and therefore inasmuch as the Orphan Chamber, as the personal representative of the testator, *Gavorke Manuk*, had received in *Java*, by virtue of their judgment in the Court there, a greater sum, towards satisfaction of the debt due to the testator's estate, than they could have obtained by divi-

dends under the insolvency, the Respondent, *Theodore Dickens*, as the like personal representative of the testator, ought not to have received in respect of the same debt the dividends which have erroneously been paid to him, and ought to refund the same.

II. Because, even if the personal representatives of *Gavorke Manuk* were entitled to receive any dividends out of the insolvent estate, in respect of the debt due to the estate of *Gavorke Manuk*, such dividends ought to have been computed and paid upon the balance of such debt only, after deducting what was recovered by virtue of the judgment in the Court of *Batavia*; and inasmuch as such dividends have been paid upon the whole debt, the Respondent, *Theodore Dickens*, ought, in any event, to refund the difference or excess beyond what he ought to have received, and ought to be restrained by injunction from receiving any further dividends until the other creditors shall have received dividends in proportion to those which have been received by or on account of the testator's estate.

The Respondent, on the contrary, contended that the judgment ought to be affirmed, and the appeal dismissed, for the following reasons :—

I. Because the Appellants have not, in and by their said bill, stated or made such a case as entitles them in equity to any discovery or relief, as is thereby sought and prayed from or against the Respondent.

II. Because, in particular, it appears by the bill, that the dividends, which have been paid on the debt due from the insolvents to the estate of *Gavorke Manuk*, and which dividends the bill seeks to have refunded, were at the time rightly due and properly paid to the Respondent, and the claim now set up by the Appellants to have those dividends refunded, ap-

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pears by the bill to be founded on the fact, that the Orphan Chamber of *Batavia*, being a foreign creditor of the insolvent subsequently to the payment and receipt of those dividends, recovered certain immoveable or real property belonging to the insolvent in a foreign country, that is to say, in the island of *Java*, within the territories of the kingdom of the *Netherlands*, which property, according to the decisions of Courts of competent jurisdiction in that foreign country, did not pass to the Appellants by the assignment made on the insolvency of *Palmer* & Co., and to which property the Appellants, after a contest in those Courts, were unable to establish any claim.

III. Because it is not alleged, nor does it appear in or by the said bill, that any further dividends will be paid on the said insolvent's estate, under the said insolvency, nor have the Appellants, in and by their said bill, stated or made such a case as entitles them to restrain the Respondent from participating in further dividends on the said estate, if any such shall be declared; and because, at all events, the case made by the Appellants did not entitle them to any relief by bill on the equity side of the said Supreme Court.

Mr. *Wigram*, Q.C., Mr. *Deacon*, and Mr. *Cockerell*, for the Appellants.

The first question for the consideration of the Court is, whether the plantation in *Java*, which we shall treat as real estate, did not pass to the assignees of *Palmer* & Co., under the provisions of the Indian Insolvent Act.

2ndly. Whether, supposing such real estate did not pass to them, the Orphan Chamber were justified in taking it in execution, after their agents in *Cal-*

cutta had proved against the estate of *Palmer* & Co. for the whole amount of the debt due from that firm, and had received dividends on the amount so proved.

3rdly. Whether the Respondent, *Dickens*, as the administrator of *Gavorke Manuk*, and the agent of the Orphan Chamber, is not bound to refund such dividends, and whether a bill in equity is not the proper proceeding for that purpose.

4thly. Whether the Appellants are not entitled to an injunction, restraining the Respondents from receiving any future dividends from the estate of *Palmer* & Co. until all the other creditors of that firm are put upon an equal footing with the Orphan Chamber, in respect of the proceeds received by them from the sale of the estate at *Java*, or by their proceedings at *Bencoolen*.

1. We submit, that the estate at *Java* passed to the assignees under the insolvency of *Palmer* & Co. The assignees, under the Indian Insolvent Act, 9 *Geo.* IV., c. 73,* take all the property of the insolvent, both real and personal, to the same extent as the assignees under an English fiat in bankruptcy. For by the 26th section of that Act, it is declared, that every such assignment shall have the effect of conveying or transferring to, and of vesting in the assignee or assignees, who shall have been appointed by the Court, and named in the assignment, the whole estate and effects, real and personal, and all rights, duties, claims, choses in action, interests and property whatsoever, which, at the time of executing the assignment, shall belong to

* This Act was continued by 2 and 3 *Wm.* IV., c. 43, to *March* 1836, and after being amended by 5 *Wm.* IV., c. 79, was further continued by 6 and 7 *Wm.* IV., c. 47, to 1st *March* 1839, and from thence to the end of the next session of Parliament.

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the insolvent or insolvents, either solely or jointly, with any other person or persons, or which shall come to or be required by him, her or them, or to which he shall be or become entitled in reversion, remainder, or expectancy, before the Court shall have made an order for the discharge of such insolvent or insolvents, &c. By section 23, also, the insolvent is required forthwith to put the assignees in possession of his estate and effects. There is no question, therefore, but that the property in *Bencoolen*, consisting of outstanding debts due to the estate of *Palmer* & Co., would pass to the assignees, not only under the statute law of England, but also according to the principles of universal jurisprudence, and the comity of nations. This doctrine is clearly laid down by Dr. *Story* in his Conflict of Laws,* where all the authorities are collected. And we submit it is equally clear, that the estate in *Java* might have been reached by the assignees, if the Orphan Chamber at *Batavia* had not interposed and seized it in execution for their own debt. [Sir *Edward Hyde East*: The right to the estate might pass, but not the possession, to the assignees.] It is laid down by Mr. *Burge*, in the third volume of his Commentaries on Colonial and Foreign Laws,† that under the Bankrupt Law of *England*, the debtor is not only deprived of the possession, administration and disposition of his effects, but the absolute property in them is transferred to the assignees. Lord *Eldon*, also, in the case of *Benfield* v. *Solomons*,‡ says that the Bankrupt Laws vest in the assignees all the property of the bankrupt, without exception. And in the important case of *The Royal Bank of Scotland* v. *Cuthbert*,§

* 336-354.
† 3 Burge's Com. 904.
‡ 9 Ves. 83.
§ 1 Rose, 462.

it was decided by the Court of Session in *Scotland*, that a Commission of Bankrupt vests in the assignees under it, all the property of the bankrupt, wherever situate, precluding creditors in a foreign country from attaching, by sequestration, their debtor's property remaining or situate in that country; and that although the Commission may not in itself operate upon the heritable property of the bankrupt in such foreign country, yet it imposes on him a legal obligation to execute the proper conveyances, and do all necessary acts for transferring it to the assignees.

The second point we have to contend for is, that, notwithstanding the real estate in *Java* might not pass to the assignees by the assignment, yet that the Orphan Chamber were not justified in taking it in execution after their agents at *Calcutta* had proved against the estate of *Palmer* & Co. for the whole amount of their debt, and had received dividends on the amount so proved.

The aim of the legislature in all the Statutes relating to bankruptcy and insolvency is, that the creditors should have an equal proportion of the effects of the bankrupt or insolvent, and that creditors of every degree should come in upon equal terms. If a creditor having a security, seeks to prove the whole amount of his debt under a fiat of bankruptcy, he must deliver up the security for the benefit of the general creditors; if he insists upon retaining the security, he can only prove for the balance after deducting the value of his security. In the present case, the Orphan Chamber at *Batavia*—having a security (that is, a lien or right of process) against the estate of *Palmer* in the island of *Java*, according to the laws of that country; come in, under the Indian Insolvent Act,

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and prove for the whole amount of their debt, without deducting the amount of their security—namely, the value of that estate, which they intended to sequester, and to appropriate the proceeds for their own exclusive benefit. Now we contend, that the Orphan Chamber, when they proved their debt, ought to have deducted the value of the estate, on which they had a lien by the laws of *Java*. It was contrary to all principles of justice in the administration of assets, whether in equity or in bankruptcy, that they should be allowed, first to prove and receive dividends on their own debt, and then proceed on their security. The obligation of the creditor to deduct the value of his security is clearly laid down in the case of *Greenwood* v. *Taylor*,* where a mortgagee petitioned for the sale of his security, and to be admitted to prove the full amount of his debt in a suit for the administration of assets; but the Master of the Rolls (Sir *John Leach*) held that this could not be done, saying, "The rule in bankruptcy must be applied here. The mortgagee cannot be permitted to prove for the full amount of his debt, but only so much as his mortgaged estate will not extend to pay. This rule is not founded upon the peculiar jurisdiction in bankruptcy, but rests upon the general principle of a Court of Equity in the administration of assets." It has been thought by some that this decision of Sir *John Leach* has been impugned by the present Chancellor in *Mason* v. *Blogg*,† which was a motion to discharge an order of the Vice-Chancellor; but his Lordship's judgment, which was against the motion, proceeded on the ground, that the order merely asserted that about

* 1 Russ. & M. 185. † 2 Myl. & C. 443.

which there could be no doubt, namely, that the vendor had a lien, and that he was a specialty creditor, leaving the question quite open as to how his rights were to be dealt with. And his Lordship expressly said, that he thought the matter was not in such a state as to call for an opinion upon the question which arose in *Greenwood* v. *Taylor*. But whether the principle was or was not correctly laid down by Sir *John Leach*, in regard to the right of proof in a creditor's suit for the administration of assets, is perfectly immaterial, for in bankruptcy there can be no doubt that it is an invariable rule that a creditor, having a security upon any portion of the bankrupt's property for his debt, must give up the security, if he prove for his whole debt,—or can only prove for the balance if he chooses to retain his security. There is a great distinction between a case of this kind, and where another person is security for the debt. There it is admitted that the creditor may prove and recover what he can from the surety; but if he has any security or lien on the bankrupt's property, he must deduct the amount from his proof.

There is another mode of considering this question —namely, that the creditor having proved for the amount of his debt against the estate of *Palmer* & Co., made his election to come in *pari passu* with the other creditors, and to abandon any right of action he might have against *Palmer* & Co., or their estate; upon the same principle as where a creditor proves his debt under a fiat in bankruptcy, he is deemed by law to have made his election, to take the benefit of such fiat, with respect to the debt so proved.* And even

* See 6 *Geo.* IV., c. 16, s. 59.

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where a creditor has two distinct demands against a bankrupt, and proves only for one of them, it has been held, that he thereby relinquishes a pending action against the bankrupt for the other. *Ex parte Dickson.** But in the present case, the creditor, after proving the whole amount of his debt, and receiving dividends on the whole, brings an action against the insolvent in *Java*, and recovers there no less than three-fifths of the amount of his debt.

The principle we are now contending for has been recognized and acted upon in several cases by Lord *Eldon*. In the case of *Drewry* v. *Thacher*,† his Lordship says, "It is fully settled, that if this Court once takes on itself the administration of the assets of a testator or intestate, a creditor seeking, and not having yet obtained, satisfaction at law, shall not be suffered to proceed there; it being impossible, while the decree is considered as a proceeding for the benefit of all the creditors, to permit some of them to proceed elsewhere." So in the case of *Perry* v. *Barker*,‡ where a mortgagee had foreclosed and sold the mortgaged estate, Lord *Eldon* granted an injunction to restrain him from recovering the difference at law, which decision was afterwards confirmed on re-hearing before Lord *Erskine*.§ According to these decisions, it is clear, therefore, that a creditor, after taking the benefit of a decree for a foreclosure, or for the administration of assets, is not permitted to sue his debtor at law.

If the property in *Java* had been personal property, and the Orphan Chamber had been within the jurisdiction of the Supreme Court, it is clear, from the doc-

* 1 Rose, 98.
† 3 Swanst. 544.
‡ 8 Ves. 527.
§ 13 Ves. 198.

trine laid down in *Sill* v. *Worsewick*,* *Hunter* v. *Potts*,† and *Philips* v. *Hunter*,‡ that they could have been compelled to refund the proceeds arising from the sale of that property. In the present case, however, it is admitted that the property being real property, must be governed by the *lex loci rei sitæ*; and that if the creditor has duly obtained possession of that property in an adverse suit, according to the law of the foreign country, he cannot be called upon to refund the proceeds, which he has by his diligence acquired. But what we contend for is, that he shall not be permitted, after thus helping himself to the greatest portion of his debt, to take the benefit of his proof against the estate of *Palmer* & Co., and receive dividends upon his whole debt. The learned Chief Justice of the Supreme Court appears in his judgment to have been strongly influenced by a dictum of Lord *Loughborough* in *Sill* v. *Worsewick*,§ where his Lordship said, "It by no means follows, that a Commission of Bankruptcy has an operation in another country against the laws of that country. I do not wish it to be understood, that it follows, as a consequence from the opinion I am now giving, (I rather think the contrary would be the consequence of the reasoning I am now using), that a creditor in that country, not subject to the Bankrupt Laws, nor affected by them, obtaining payment of his debt, and afterwards coming over to this country, would be liable to refund that debt. If he had recovered it in an adverse suit with the assignees, he would clearly not be liable." In the present case, however, the bill was filed by the Appellant, not to

* 1 H. B. 665. † 4 T. R. 182.
‡ 2 H. B. 402. § 1 H. B. 693.

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compel the creditor to refund any portion of his debt, but the dividends upon that debt, which, after receiving the greatest portion of his debt, he ought not in conscience and equity to be permitted to retain. There is a much stronger dictum of Lord Chief Justice *Eyre*, in *Philips* v. *Hunter*,* that makes in favour of the claim of the Appellants; and it is of the greater weight, because that eminent Judge differed with the other Judges upon the main question in that case. His Lordship there said, "If a man use legal diligence in a foreign country, and obtains a preference, it cannot be helped, but if he afterwards comes here for a dividend, he shall first refund what he has so acquired by his lawful diligence, and come in equally with the rest of the creditors, or not come in at all. This is the only fair and practicable coercion that can be used towards creditors abroad." The consequence of this reasoning is plain, as applied to the present case, if the Orphan Chamber choose to come in under the insolvency of *Palmer* & Co., and insist upon retaining the dividends they have received, they ought to refund what they have acquired by their legal diligence in *Java*: if they refuse to do this, they ought to be compelled to refund the dividends, because they ought not to have been permitted to come in at all under *Palmer* & Co.'s insolvency. The judgment of Lord *Eldon*, also, in the case of *Selkrig* v. *Davis*,† is in entire accordance with the principle thus laid down by Lord Chief Justice *Eyre*. His Lordship says, "It has been decided, that a person cannot come in under an English Commission, without bringing into the common fund what he has received abroad. The

* 2 H. B. 413.

† 2 Rose, 318. 2 Dow. 231.

reason of that cannot be merely that all the creditors under the Commission are to be put on an equal footing. If he has got property (which did not pass under the Commission) before he came in, whatever Chancellors may have said on the subject, they had no more right to call into the common fund that which he *had got* by law, and which was kept out of the common fund, than any other part of his property. It could only be, therefore, because the law did not pass the property of the individual coming within your jurisdiction, that you say to him, if you claim anything under this Commission you shall not hold in your hands the property which you have got by force of the law of another country. If a man choose to say, I will not bring into the common fund that sum which I have received, then let him retire." If the Orphan Chamber, therefore, had got the property at *Java* before they came in under *Palmer* & Co.'s insolvency, they could not of course be compelled to refund what they had so got by law; but as they got it after they had so come in, it would seem to follow, from this reasoning of Lord *Eldon*, that if they claim anything under *Palmer* & Co.'s insolvency, they ought not to hold in their hands the property which they have got by force of the law of another country.

But the bill, in the present case, does not pray that the Respondents may refund the proceeds of the property at *Java*, but merely the dividends which they have received on proof of their own debt; and this brings us to the third proposition, namely, that the Respondent is bound, as the executor of *Gavorke Manuk*, and the agent of the Orphan Chamber, to refund the dividends which he had so received, and that a bill in equity is the proper proceeding for that

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purpose. It is quite clear from the authorities already cited, that if the Orphan Chamber insist on the retention of the property which they have acquired by their legal diligence in *Java*, they are bound to retire from any claim to a distributive share under *Palmer* & Co.'s insolvency ; and if they are bound to retire from any such distributive share, it follows, that they ought to refund any dividends which they have received on account of such distributive share. That they are not entitled to these dividends is plain, from what Lord *Hardwicke* said in a case in *Wilson's* Bankruptcy,* where an application was made to stay proceedings against the bankrupt's property in *Scotland*, which, although Lord *Hardwicke* said could not be done, yet he added, that if the effects there were not sufficient to satisfy the party's debt, and he applied for a dividend under a Commission here, in that case he would postpone him till the rest of the creditors were paid in the same proportions as he had received. If it is contrary to equity, that the Orphan Chamber should retain the dividends upon their whole debt, after paying themselves the greatest portion of that debt, by their seizure of the insolvent's property in *Java*, it seems to be a necessary consequence of that proposition, that a Court of Equity will compel them to refund such dividends upon the same principle as it compels one of several legatees, who has been paid his legacy in full, and the assets prove afterwards deficient, to refund what he has so received, and to come *in pari passu* with the other legatees.† So if there be a deficiency to pay the debts of a testator, a

* See Waring *v.* Knight, 1 Cooke's B. L. 300.

† Anon. 1 P. Wms. 495. Edwards v. Freeman, 2 P. Wms. 447. Orr v. Kaines, 2 Ves. 194.

legatee, who has received his legacy, is, in all cases, liable to refund to creditors.* In bankruptcy, also, the same principle applies; for where a creditor, proving his debt under a Commission, had been paid a dividend upon the amount of his proof under an order of the Lord Chancellor, obtained by him for that purpose, and it turned out afterwards that he was not entitled to retain the dividends upon the whole amount of his proof, Lord *Eldon* said, Upon a petition of the assignees, praying that the creditors might be ordered to refund; that there could be no doubt of the authority of the Court to recall the dividends, and that the practice had been long established. *Ex parte Burn.*† So, where a proof was ordered to be expunged, but, before the order was made, the creditor had received dividends upon the proof, an order was made by Lord *Eldon*, that he should refund the dividends to the assignees, upon a petition presented by them for that purpose. *Ex parte Dewdney.*‡

The *fourth* proposition we contend for is, that the Appellants were entitled to an injunction, restraining the Respondents from receiving any future dividends from the estate of *Palmer* & Co., until all the other creditors of that firm were put upon an equal footing with the Orphan Chamber, in respect of the proceeds received by them from the sale of the estate at *Java*, or by their proceedings at *Bencoolen*. The learned Chief Justice of the Supreme Court at *Calcutta*, in deciding against the species of relief prayed by the bill, observed, that no mention was made in the bill

* Noel *v.* Robinson, 1 Vern. 94, 460; Hodges *v.* Waddington, 2 Ventr. 360; Davis *v.* Davis, Dick. Rep. 32; Hardwicke v. Mynd, Anstr. 113; Newman *v.* Burton, 2 Vern. 205.

† 2 Rose, 55. ‡ 2 Rose, 59, note.

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for any further dividends being likely to arise, but that the relief, which the complainants asked by injunction, was founded entirely on the assumption, that the dividends were improperly paid, and ought to be refunded. But we submit that the very statement in the bill, that there were outstanding debts owing to the estate of *Palmer* & Co. at *Bencoolen*, sufficiently shows that there is a fund out of which further dividends might be likely to arise. At any rate, the Appellants were entitled to an injunction to restrain the proceedings against the *Bencoolen* debtors, or to restrain the Respondents from receiving any further dividends until those proceedings were abandoned, and this, under the prayer of the bill for general relief. It has been already shown, that when a creditor has come in under a Commission of Bankrupt, he cannot afterwards sue the bankrupt at law; for having deliberately made his election to take the benefit of the Commission, he will be restrained from prosecuting an action against the bankrupt for recovery of the same debt. Upon the same principle, it has been determined, that after a Plaintiff has obtained a Decree for an account against a party in a Court of Equity, he will be restrained from proceeding at law against the Defendant, pending the suit in Equity. *Mocher* v. *Reed*,* *Wilson* v. *Wetherhead*.† So in the case of *Booth v. Leycester*,‡ where a Plaintiff had instituted a suit in the Court of Chancery in *England*, in which that Court had pronounced a Decree refusing the relief sought by the Plaintiff, and he afterwards commenced a suit in the Court of Chancery in *Ireland*, in which the subject matter was

* 1 Ball & B. 318.
† 2 Meriv. 406.
‡ 1 Keen. 579.

the same, the English Court of Chancery granted an injunction to restrain the Plaintiff from proceeding further in the Irish court. It appears from these cases, therefore, that a party will be restrained from proceeding against another in a foreign country, for the same cause of suit, for which it has instituted proceedings against him in this country; and the same principle applies to a party who has proved his debt, and has taken the benefit of the English Bankrupt or Insolvent Law.

The Respondent alleges that the Appellants have not shown, by the statements in their bill, that they are entitled to any equitable relief. Now, what the bill shows is this, that the Orphan Chamber, after proving their debt against *Palmer* & Co.'s estate, and receiving dividends on the whole amount rateably with the other creditors of the insolvents, got possession of the estate in *Java*, by which alone they realize three-fifths of their whole debt, and obtain more than three times as much as any of the other creditors. Whether such proceedings are accordant with principles of equity, is now for the Court to determine. Lord *Coke*, in his definition of equity, says, "*Æquitas est quasi Æqualitas*;" but the Respondent, in this case, would contend that the greatest equity is the grossest inequality. The learned Chief Justice of the Supreme Court, in the course of his judgment on the hearing of the demurrer, acknowledges more than once, "that the case was attended with great doubt and difficulty," and we submit, that when a Court of equity entertains any doubt in regard to the law applicable to a case, it should lean to that decision which is most consonant to principles of Justice and Equity. There can be no doubt, as the Chief Justice himself admits, that the great prin-

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ciple of the Bankrupt Laws, which is justice founded on equality, would be grossly violated in this particular instance, if a creditor, after coming *in pari passu* with the other creditors of the insolvents, were permitted to retain the dividends on his whole debt, besides recovering three-fifths of the debt by proceeding against the property of the insolvents in a foreign country. The dictum of Lord *Loughborough* in *Sill* v. *Worsewick*,* which weighed so much on the mind of the Chief Justice in deciding this question, merely applies to the liability of a foreign creditor to *refund what he has acquired by his legal diligence in the foreign country*, and is no way applicable to the present case. The Plaintiffs here do not require the creditor to refund the fruits of his judgment in the island of *Java*; but they say, that it is contrary to equity, and inconsistent with every notion of justice, that he should be permitted to retain the dividends received by him on the whole amount of his debt, which he was only allowed to prove, on the faith of an implied agreement to come in equally with the other creditors of the insolvents. It is true that this point does not altogether escape the attention of the learned Chief Justice, for he says, "Can the recovery of this judgment by the foreign creditor give to the assignees equitable grounds for applying to a Court of Equity to oblige the creditor to refund dividends, to which, at the time he received them, he was clearly entitled?" Now, supposing that the foreign creditor had, instead of three-fifths, received the whole of his debt by his proceedings in the Courts at *Java*, can it be doubted for a moment that he would in that case be compelled to refund the divi-

* 1 H. B. 693.

dends which he had previously received, notwithstanding, at the time he received them, he might have been fairly attached to them? In the case already cited, of *Ex parte Burn*,* the creditor, at the time he received the dividends, was fairly entitled to them, under an order of the Lord Chancellor, but it was no reason, because he was at the time entitled to receive them, that he was afterwards entitled to retain them, when subsequent events, in which the creditor was an acting party, rendered the retention of them inequitable and unjust.

On the various grounds we have mentioned therefore, and more especially on the ground of proof being considered an election to come in equally with the other creditors under a Commission, and an abandonment of all right to sue the bankrupt at law for the same debt, we submit that the Appellants, the Plaintiffs in the Court below, were clearly entitled to an order on the Respondent to refund the dividends which he had received as the representative of the Orphan Chamber, and to restrain him from receiving any further dividends until all the creditors of *Palmer* & Co. should have received dividends sufficient to put them on an equal footing with the Orphan Chamber.

Mr. *Pemberton*, Q.C., Mr. *G. Richards*, Q.C., and Mr. *Coleridge*, for the Respondents.

The Appellants are not entitled to any relief by bill on the equity side of the Supreme Court, but ought to have proceeded, by petition, in the matter of *Palmer* & Co.'s insolvency. There is no case to be found in the books where dividends have ever been

* 2 Rose, 55.

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ordered to be refunded to assignees in a proceeding by bill. It has been contended on the other side, that the Appellants were entitled to an order of the Supreme Court to restrain the Respondent, or the Orphan Chamber, from proceeding against the debtors to the estate of *Palmer* & Co. at *Bencoolen*, and that this order could have been made under the prayer for general relief. But as no part of the prayer of the bill is to restrain proceedings against the debtors at *Bencoolen*, no specific relief of this description could be obtained under the prayer for general relief, unless the particular relief sought was applicable to the allegations in the bill. Now there is no allegation in the bill which would justify an order for an injunction to restrain the Orphan Chamber from proceeding against the debtors in *Bencoolen*, and, moreover, such an order could not be made, because the Orphan Chamber was not a party to the suit, nor subject to the jurisdiction of the Supreme Court.

But as to the main question, whether the Orphan Chamber were justified in proceeding against the estate of *Palmer* in the island of *Java*, to recover a portion of their debt, it is clear, that the estate there did not pass by the assignment to the assignees of *Palmer* & Co., for on that question a Court of competent jurisdiction has decided in the negative. Neither the Bankrupt Law of England, nor the Insolvent Law as administered at *Calcutta*, can control the law of an independent foreign state. In *Sill* v. *Worsewick*,* Lord *Loughborough* expressly says, "It by no means follows that a Commission of Bankrupt has an operation in another country against the law of that country," or "that a creditor in that country, not subject to the

* 1 H. B. 693.

Bankrupt Laws, nor affected by them, obtaining payment of his debt, and afterwards coming over to this country, would be liable to refund that debt. If he had recovered it in an adverse suit with the assignees, he would clearly not be liable." Now, in the present case, the property was recovered in an adverse suit with the assignees, for they contested the right of the Orphan Chamber in the Courts at *Java*, and were unable to defeat their claim. But in no case where a party has recovered a debt in a Court of competent jurisdiction by due process of law, can he be compelled to refund the money so recovered, because another party might have successfully resisted his claim. For suppose a man, after becoming bankrupt and obtaining his certificate, is sued by a creditor for the amount of his debt, and neglects to plead his certificate, could the creditor be compelled to refund the money he had thus recovered in the action? The observations of Lord *Eldon* in *Selkrig* v. *Davis*,* which has been so strongly relied on by the other side, make much more in favour of our case than theirs. His Lordship there says, "If the creditor of a bankrupt has got property (which did not pass under the Commission) before he came in, whatever Chancellors might have said on the subject, they had no more right to call into the common fund that which is got by law, and which was kept out of the common fund, than any other part of his property." [Mr. Justice *Bosanquet*: In the case put by Lord *Eldon*, the creditor had received the proceeds of the estate in the foreign country, before he came in under the Commission.] In the present case it is clear, that by the law of *Java*, the real estate of the insolvents did not pass to the assig-

* 2 Rose, 318.

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nees, and in *Selkrig* v. *Davis*,* Lord *Eldon* expressly says, "That according to the English law, there is no authority to compel a bankrupt to convey the real estate" belonging to him in a foreign country, and that the only mode of getting at the real property of a bankrupt in *Scotland* "was, for the creditors to assign their debts to some individuals who proceeded against the heritable property, according to the Scotch law, or to withhold the certificate till the bankrupt consented to convey." Now here we have obtained, by our legal diligence, what the assignees could never have obtained by the law of *Java*, which it must be taken for granted, prevented the bankrupt's property in that island from passing to them by the assignment. [Mr. Baron *Parke*: The Appellants ought certainly to have stated in their bill, that by the law of *Java* they could not have recovered the property belonging to the insolvents in that country, if the Orphan Chamber had not adopted proceedings for that purpose.] In *Hunter* v. *Potts*,† it is admitted by Lord *Kenyon*, in delivering his judgment in that case, that the property of a bankrupt, in a foreign country, does not pass to his assignees, if there is some positive law of that country to prevent it; and he also adds, that if there be a law of that country directing a particular mode of conveyance, that mode must be adopted. It is well known, that the American Courts permit a creditor to take the property of his debtor in that country, notwithstanding our Bankrupt Law. And even if the property is situate in our own colonies, it was decided in *Buckwood* v. *Miller*,‡ that where a creditor of two persons in the *West Indies* had attached joint property

* 2 Rose, 98. † 4 T. R. 192. ‡ 3 Meriv. 279.

there, the assignees of one partner resident and become bankrupt in England, were entitled only to the surplus in his hands, after satisfaction of his joint debts.

It has been urged, on the part of the Appellants, that the Respondent is bound, in equity and conscience, to refund the dividends he has received, after the Orphan Chamber has recovered a portion of their debt by their proceedings in *Java*. But is there any thing inequitable or contrary to conscience, that a creditor should, by legal process, be able to recover the whole of his debt? If the assignees have any equity in this case against the Respondent, it must have existed at the time the proof was tendered by him under the insolvency of *Palmer* & Co. The equity ought to be cotemporaneous with the proof, or the receipt of the dividends. Now, what equity had the assignees in this case on either of those periods? The Orphan Chamber had not, either at the time of the proof or the receipt of the dividends, received one farthing from any other source, in reduction of their debt, and it was quite uncertain whether they ever would. But even granting that their right of any future proceeding against the estate in *Java* was to be considered in the nature of a present security then held by them, we say that the security would only amount to a separate security of one partner for a joint debt, for the estate in *Java* did not belong to the firm of *Palmer* & Co., but to *John Palmer* alone. Cannot a joint creditor, therefore, holding the separate security of an individual partner of a firm, prove the whole amount of his joint debt, and proceed afterwards against the separate partner? The decision in *Ex parte Peacock*,* clearly

* 2 G. & J. 27.

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shows that the creditor is entitled to do so. It is quite clear in this case, that the property in *Java* did not form part of the general property belonging to *Palmer* & Co.; for the allegation in the bill is, that the property was held by *John Palmer* in his sole name, for the joint benefit of the two firms of *Palmer* & Co. and *Cockerell* & Co., in equal shares. Then with respect to that portion of the proceeds arising from the sale of this property, which would have belonged to *Cockerell* & Co., how could that have formed part of the estate of *Palmer* & Co.? Taking it either way, whether as the joint property of *Palmer* & Co. and *Cockerell* & Co., or as the separate property of *John Palmer*, it would in neither case be the property of the assignees. And if the allegation in the bill is correct, that this plantation or estate was purchased and carried on for account, and with the joint funds, of the two several firms of *Palmer* & Co. and *Cockerell* & Co., the assignees could not claim any portion of this property until an account was taken of the dealings of these two firms, and it was ascertained what balance was due from one to the other.

For these reasons we submit that the judgment of the Supreme Court was right, and ought to be affirmed.

Mr. *Wigram* in reply.

With respect to the objection that has been now, for the first time, raised by the Respondent, that the Appellants ought to have proceeded by petition, and not by bill, the answer is, that the proceeding in *Java* was not a proceeding in the Insolvent Court, and therefore the proper remedy was by bill, and not by petition. But this objection was not included in one

of the causes of demurrer to the Plaintiff's bill, nor was the point ever raised in argument in the Court below. As it was not taken then, it is clear therefore that it was not the practice of the Court to proceed by petition. In regard to the observation of one of their Lordships, that the bill is defective in not stating that the assignees could have recovered the property in *Java*, if the Orphan Chamber had not interposed, it is expressly alleged in the bill, that the assignees, after the insolvency of *Palmer* & Co., duly instructed the firm of *Maclaire* & Co., as their agents at *Batavia*, to take possession of the plantation and estate in *Java* and of the interest of *Palmer* & Co. therein, and to dispose of and realize the same for the benefit of the creditors of the insolvent firm, and to remit the proceeds thereof to the assignees, for distribution amongst the creditors at large in due course, and that they were prevented from doing this by the proceedings of the Orphan Chamber. This, it is submitted, amounts to an allegation that the property could have been recovered by the assignees for the benefit of the general creditors, if the Orphan Chamber had not interfered. If this property, therefore, might have been recovered by the assignees, but for the proceedings of the Orphan Chamber, who had, by their previous proof against *Palmer* & Co.'s estate, for their whole debt, agreed to come *in pari passu* with the other creditors, the assignees are entitled to have the dividends returned to them, which were only paid to the Orphan Chamber on the faith of that agreement. As to the objection to the stay of any further dividends, that no mention is made in the bill of any further dividends being likely to arise, it is perfectly clear, that there are assets in *Bencoolen* to which the assignees are

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entitled, and which therefore remain to be divided amongst the creditors. And there is as little doubt, that the assignees might impound any further dividends, payable to the Orphan Chamber on their proof, until they abandoned their proceedings against the *Bencoolen* debtors. But it is submitted, that the assignees are, under all the circumstances, fully entitled to an order on the Respondent, to refund the former dividends, as well as an injunction to restrain him from receiving any further dividends, and that the judgment of the Supreme Court must be reversed.

Mr. Baron PARKE:

24th Feb. 1840.

This is an appeal from an order of the Supreme Court at *Calcutta*, on the Equity side of that Court allowing a demurrer and dismissing a bill.

The facts stated in the bill, and admitted by the demurrer, are shortly these:

The Appellants, the Plaintiffs below, are the assignees, under the Indian Insolvent Act, of *Palmer* & Co., who were indebted, at the time of their insolvency, to the estate of a deceased Armenian merchant, *Gavorke Manuk*, domiciled at *Batavia*, in the sum of 2,52,460 rupees. The Respondents were, at the time of the filing of the bill, the representatives of the deceased in *Bengal*: other representatives had been appointed before, and been removed. In *Batavia* his representatives were the Orphan Chamber, who, after the insolvency, proceeded in the Court at *Batavia* to recover satisfaction from a real estate in *Java*, the joint property of *Palmer* & Co. and *Cockerell* & Co., but held in the individual name of *Palmer*. The assignees of *Palmer* & Co. in vain interposed: their claim was disallowed by the Colonial Court and the

Court of Appeal in *Europe*, and the Orphan Chamber ultimately recovered 1,50,134 rupees, a sum greatly exceeding the amount of all the dividends declared at the time the bill was filed on the debt of 2,52,460 rupees, or likely to be declared thereon. In the meantime, and before the process against the real estate in *Java*, the *Bengal* representatives of the deceased received at different times from the assignees of the insolvent estate, dividends amounting to 71,793 rupees on the whole debt. The Orphan Chamber had also caused process to be served on debtors of the firm domiciled at *Bencoolen* in the island of *Sumatra*, and were endeavouring to enforce the sentence which they had obtained at the Court at *Batavia* against those debtors. And the prayer of the bill was, that the Defendant, the now Respondent, might be decreed to refund to the Plaintiffs all the dividends received by him, or the preceding representatives of the deceased creditor in *Bengal*, with interest, and that the Defendant might be restrained by injunction from suing for, demanding, or recovering any future dividends, from the estate of *Palmer* & Co., in respect of the debt due to the deceased's estate, until all the other creditors of the insolvent firm should have received dividends on their respective debts, proportionate to, and in the like ratio, as the sum realized by the process in the island of *Java*, or which had or might be realized by the proceedings at *Bencoolen*, or elsewhere, within the kingdom of the *Netherlands*; and for such further and other relief as the nature of the case should require.

The learned Chief Justice of the Supreme Court, Sir *Edward Ryan*, with the notes of whose judgment we have been furnished, had his attention directed

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solely to the question, whether the Defendant was bound to refund the past dividends, and ought to be restrained from receiving any in future, in consequence of the satisfaction received by the Orphan Chamber, (representing the same deceased creditor as the Defendant,) out of the real estates of the insolvent in *Java*. Upon a review of the authorities upon this subject, and acting on the distinction between personal and real estate, the former of which is, generally speaking, governed by the law of the domicile of the owner, and transferred by an assignment according to that law, the latter by the *lex loci rei sitæ*, and not so transferred—the Chief Justice gave his opinion, though with some little doubt, that the assignees had no right to the real estate in *Java*, and consequently allowed the demurrer and dismissed the bill.

If this had been the sole question in this case, their Lordships have no difficulty in saying that they should have concurred entirely in opinion with Sir *Edward Ryan*. If the real estate in *Java* did not pass by the assignment under 9 *Geo*. IV., c. 73, s. 9, nor could in any way be got hold of, and made available by the assignees, for the payment of the general creditors, any individual creditor who could obtain it by due course of law, would have a right to hold it, and if he duly proved the debt due to him, before he had been paid any part of the debt so proved, by means of that estate, he would be entitled to receive the dividends under the insolvent estate, until he had been paid altogether twenty shillings in the pound, exactly in the same way as if the creditor had had a security on the real estate or personal credit of a third person. In this case he could neither be compelled to refund the money obtained by means of the real estate, or the

dividends received on the debt, or be restrained from receiving those hereafter to become due.

The principle is, that one creditor shall not take a part of the fund which otherwise would have been available for the payment of all the creditors, and at the same time be allowed to come in *pari passu* with the other creditors for satisfaction out of the remainder of that fund: and this principle does not apply where that creditor obtains by his diligence something which did not and could not form a part of that fund.

Was the real estate in *Java* therefore a part, or capable of being made part, of the general fund distributable under the *Bengal* Insolvent Act? Upon the statements contained in the bill, it does not appear that it was. Under the general assignment made by *Palmer* & Co., of all their property which would operate wherever, but not elsewhere, the Imperial Parliament could give the law, it certainly would not pass, unless the law of *Java* made such conveyance, being in the English form operative. There is no statement that it did; and on the contrary, as the intervention of the assignees was held to be ineffectual by the Court at *Batavia* and by the Court of Appeal in the *Netherlands*, it must be assumed that by the *lex loci rei sitæ* the assignees were not at the time of the suit by the creditors entitled to the property.

But it is said that they might by some mode of proceeding have obtained this property, and brought it into the common fund, if the creditors had not interfered. We are not however able to see in what way that could have been accomplished by the law of *England* in force at *Calcutta*: there is no statement that it could have been done by the law in force at *Java*; as to the law of *England*, assuming that it did not

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pass, we have the authority of Lord *Eldon* in *Selkrig* v. *Davis*, (2 Dow. 245.) in the analogous case of an English Commission of Bankruptcy, that a bankrupt could not be compelled directly to assign his foreign real estate to his assignees, and though there are indirect methods, as withholding their certificate, or by creditors assigning their debts to others in order to obtain execution against the real estates, neither of these are in the power of the assignees, as such, nor would the first of them seem to be in any case properly applied; at all events no such steps, as far as appears by the bill, were taken by any persons at the time the right of the Orphan Chamber accrued. They were then, by law, fully entitled to have satisfaction out of the real property, and that property was at that time no part of the fund available for the benefit of the general creditors. And we are of opinion, on these grounds, that the personal representatives of the deceased were entitled to all the benefit they had then obtained by their diligence, as much as if it had been the estate of a stranger.

But it is insisted on the behalf of the Appellants, that the bill states that there was personal estate at *Bencoolen*, viz., the debts due from persons domiciled there, and which did pass under the assignment, and that they were entitled to some species of relief, under the general prayer of relief, in respect of that part of their claim. Such relief, it was contended, ought to be given either by injunction to restrain proceedings against the *Bencoolen* debtors, or to restrain the Defendants from receiving further dividends unless those proceedings were declared to be abandoned. It was not disputed that the debts at *Bencoolen* did pass by the general law of nations under the assignment; but

it was contended that in this case the Plaintiff could not have any part of that relief which they now ask.

First; that no injunction could be granted to restrain the proceedings against the *Bencoolen* debtors, because the Orphan Chamber was not a party to the suit, nor subject to the jurisdiction of the Court. And this we think is a satisfactory answer to the argument that this species of relief could be granted.

Secondly; that an injunction to stay the receipt of dividends was not the proper remedy, but that the jurisdiction was in the Insolvent Court on petition. We do not find that any jurisdiction is given to the Insolvent Court by the 9th *Geo.* IV., c. 73, to determine such matters on petition, and we cannot assume that they have any such power; still less that they have such power exclusively. This objection therefore cannot prevail.

Lastly; it was said that the Plaintiffs were not entitled to such relief, under the general prayer. There is no dispute about the rule on this subject, which is laid down by Lord *Eldon*, in *Hiern* v. *Mill*, (13 Ves. 119.) in very distinct terms: "The rule is, that if the bill contains charges, putting facts in issue that are material, the Plaintiff is entitled to the relief which those facts will sustain under the general prayer, but he cannot desert the specific relief prayed, and under the general prayer ask specific relief of another description, unless the facts and circumstances charged by the bill will, consistently with the rules of the Court, maintain that relief." If we apply this rule to the present case, we find that the specific relief which is now contended may be asked for at the bar under the general prayer,—namely, an injunction to restrain the receipt of dividends, until the proceedings at

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Bencoolen should be abandoned, is supported and warranted by the general case made by the bill as to the personalty, and is, in truth, a relief of the same description as that specifically prayed for, namely, an injunction to stay the receipt of dividends until all the creditors were on an equal footing. It is only a different qualification or modification of the specific relief prayed.

We are of opinion, therefore, that as the Plaintiff had an equity to obtain some relief under the bill, the demurrer ought not to have been allowed, and the order of the Court below must be reversed.

JEWUN DOSS SAHOO - - - *Appellant,*

AND

SHAH KUBEER-OOD-DEEN - - *Respondent.**

On Appeal from the Sudder Dewanny Adawlut in Bengal.

8th & 9th Dec. 1840.

BY a *Firman*, or royal grant, of the 14th of *March* 1717, in the fifth year of *Mahomed Feroksir*, one lac

The terms *Altamgha* or *Altamgha-inam*, in a royal grant, does not, of itself, convey an absolute proprietary right to the grantee; where, from the general tenor of the grant, it is to be inferred, that a *Wukf*, or endowment to religious and charitable uses, was intended, and property so endowed cannot be alienated by the grantee or his representatives.

According to the Mahomedan Law, it is not necessary, in order to constitute a *Wukf*, or endowment to religious and charitable uses, that the term *Wukf* be used in the grant; if, from the general nature of the grant, such tenure can be inferred.

An endowment for charitable and public purposes being a perpetual endowment, it is by Regulation XIX of 1810, the duty of the Government to preserve its application; and being excepted by sec. 2 of Regulation II of 1805 from the general operation of the Regulation of Limitation, no suit for its recovery is barred, until at least the officer entitled to administer it has been in possession of his office for twelve years.

* Present: Members of the *Judicial Committee*,—Lord Brougham, Mr. Justice Bosanquet, Mr. Justice Erskine, and the Right Honourable Dr. Lushington.

Privy Councillor,—*Assessor*, Sir Edward Hyde East, Bart.

of *dams* from *Pergunnah Havilly Suhseram*, in the *sooba Bahar*, being equal to about 1,197 rupees, was granted in *Altamgha*, or royal free gift, in perpetuity, for the purpose of defraying the expenses of the *Khankah*, a religious establishment of *Sheikh Kubeer*, *Dervish*, to descend to his heirs in succession.

In pursuance of this grant, *Sheikh Kubeer* received the revenue during his life, applying it for the purpose of meeting the charges of travellers frequenting the *Khankah*, of which he was the *Sijjada-nashin*, or superior. Upon his death he was succeeded in his office by his son, *Sheikh Khulleel-oolla*.

By a *Sunud* from *Nawab Fukhr-ood-deen Bahadur*, on the 16th *Sheban*, and the fourteenth year of the reign of *Mahomed Shah Badshah*, (21st *January* 1733,) certain *Mouzas* or villages in the *Pergunnah Suhseram*, in the *Sircar* or division *Rowtas*, *sooba Bahar*, with some *Tutera* and *Khankah* lands, were appropriated for the purpose of meeting the expenses of travellers, and of *Sheikh Khulleel-oolla*, and freed from the Government charges and revenues. Upon the death of *Sheikh Khulleel-oolla*, he was succeeded, as *Sijjada-nashin*, by *Gholam Shurf-ood-deen*, his son, who, on the 6th of *July* 1744, obtained a royal *Sunud*, and on the 4th of *December* in the same year a royal *Perwannah*, confirming him in the dams originally granted to his paternal grandfather, *Sheikh Kubeer*.

Shah Kaim-ood-deen succeeded his father, *Gholam Shurf-ood-deen* as *Sijjada-nashin*, and obtained a like *Perwannah* to those granted to his father and grandfather, and by a *Firman* of *Shah Alum*, dated the 13th of *October* 1762, a further grant of 2,81,000 *dams* from the *Pergunnah Suhseram* was made to him in *Altamgha-*

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inam, for the purpose of defraying the expenses of the frequenters to and from him, and all ranks were enjoined "always to maintain and uphold the august order, and to relinquish the aforesaid *dams* to them to descend to the offspring in succession, to be enjoyed by them," free from all Government and revenue charges.

On the 10th of *January* 1764, *Mahomed Jafir Khan* augmented the revenues of the *Khankah* by the grant of certain *Ayeema** *Dehauts*, consisting of fourteen *Mouzas* in the same *Pergunnah*; and he executed a *Sunud* for that purpose.

Shah Kiam-ood-deen was succeeded as *Sijjada-nashin* of the *Khankah* by his son, *Shah Shumsh-ood-deen*, who, on the 27th of *January* 1807, some time after he had been in possession, entered into a contract with the Appellant, *Jewun Doss Sahoo*, for the loan of rupees 23,501, and, as security for the repayment thereof, transferred sixteen *Mouzas*, comprised in and constituting part of the above-mentioned grants. As the revenue authorities do not register mortgages or conditional conveyances, *Shah Shumsh-ood-deen* at the same time executed an absolute bill of sale, conveying the *Mouzas* to the Appellant, and the Appellant, as is usual in such transactions, executed a *Meadi Ikrar-namah*, or defeazance; which provided, that if *Shah Shumsh-ood-deen* repaid the sum advanced on or before a particular day, the sale should be void, but if he did not repay that sum within the stipulated period, then the *Mouzas* should become the absolute property of the Appellant. Shortly after the execution of these

* Charitable grants made by the Sovereign to religious Mahomedans.

instruments, the Appellant entered into possession of the *Mouzas*.

The loan was not repaid within the stipulated period; but in consequence of the Appellant not having taken the course provided for by Regulation XVII of 1806, the *Mouzas* still remained in the possession of the Appellant, according to the terms of the conveyance above referred to, subject to the right of redemption by *Shah Shumsh-ood-deen*, the mortgagor.

On the 13th of *Magh* 1217 *Fusly*, (2nd *February* 1810, A.D.,) *Shah Shumsh-ood-deen*, in consideration of a further sum of rupees 5,000, executed another *Ikrar-namah*, conveying the *Mouzas* to the Appellant absolutely.

On the 3rd of *February* 1810, the day after the execution of the above *Ikrar-namah*, *Shah Shumsh-ood-deen* died, leaving *Mussumat Kadira*, his widow, and *Shah Kubeer-ood-deen*, the present Respondent, his son, an infant of the age of twelve years, hereditary successor to the *Sijjada-nashin*.

Shah Shumsh-ood-deen attained the age of eighteen in the year 1816, when he preferred a petition to Mr. *John Deane*, the Commissioner of *Bahar* and *Benares*, asserting his right and title to the whole of the lands above stated. Mr. *Deane* directed inquiries to be made by the local agents, who, on the 10th of *December* 1818, reported in his favour, and thereupon orders were issued by the Governor-General in Council, on the 29th of *February* 1819, and the 8th *September* 1822, that the Respondent *Shah Shumsh-ood-deen* should recover possession of the property by assistance of the officers of the Government.

In consequence of these proceedings, the Respondent commenced two suits in the Provincial Court of *Patna*

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for the recovery of the villages which had been alienated from the *Khankah*. Some of these villages being in the possession of one *Mussumat Kadira*, or *Beeby Ismut*, a suit was instituted against her; and for the recovery of the *Mouzas* taken possession of by *Jewun Doss Sahoo*, under the circumstances above stated, a suit was brought against him on the 17th of *April* 1822. In the plaint filed in this latter suit, the Plaintiff set forth his title as already detailed, and insisted that the *Mouzas* in question were *Wukf** property, of which, neither a conditional or *bonâ fide* sale could be made: he insisted also that the sale was in itself illegal, not being perfected according to Regulation XVII of 1806; and he prayed to be put in possession of the annual produce, being rupees 3,678. 10., the eighteen-fold of which was rupees 66,179. 4 anas.

On the 28th of *June* 1822, and before any answer had been put in by the Defendant in this suit, the Provincial Court of *Patna* made a Decree in the other suit against *Mussumat Kadira*, or *Beeby Ismut*, whereby they declared, that it appeared from the documents, among which were the two royal *Firmans* above stated, and the evidence and opinions of the law-officers of the Sudder Dewanny in a cause therein referred to, that lands, which were *Wukf*, could not be alienated to any other person by sale or gift, nor could they be inherited as heritable property, or mortgaged or sold conditionally. The Court went on to declare, that it was not in the power of any of the former *Sijjada-nashins* to alienate the *Altamgha* and other *dams*, or the *Dehauts*, in favour of any one, or to sell

* In Mahomedan law, a bequest for pious uses.

or otherwise dispose of the property: a Decree was therefore passed in that suit in favour of the Plaintiff, the present Respondent, from which Decree the said *Mussumat Kadira* afterwards appealed to the Sudder Dewanny Adawlut; but the Decree was, on the 24th of *August* 1824, affirmed by the Sudder Dewanny Adawlut.

On the 9th of *March* 1824, the present Appellant put in his answer, insisting upon the legality of the sale to him, that it was a *bonâ fide* sale, and not within Regulation XVII, A.D. 1806, and that, had not the *Dehauts* been alienable, the collector would not have entered the name of the Defendant in the public books, and he also set up the lapse of time as a bar to the Plaintiff's claim. He contended moreover, that the conditional sale had become absolute, and that a further advance of 5,000 rupees having been made, a new conveyance was executed to the Appellant, and the power of redemption extinguished, and insisted that the property in question was legally saleable.

In his replication the Respondent relied upon his minority, to prevent the lapse of time from barring the claim.

The suit between the parties to the present appeal being at issue, evidence was produced by the Respondent, consisting of the several documents already stated, forming and establishing his title, and proving the nature of the *Dehauts* or villages in question, and the objects for which they were granted; the different *Perwannahs* and *Sunuds* confirming the Respondent's ancestors in the possession; two opinions of the law-officers upon the tenure of the lands, showing, that by the Mahomedan law the sale or mortgage of *Wukf* lands were illegal, and that the lands in question were

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of that description. The Defendant also produced documentary evidence, consisting of the instruments by which the conditional sale in 1809 was effected, and the document which he purported to be the absolute conveyance and sale relied upon.

On the 29th *December* 1825, the cause came on for hearing before Mr. *Fleming*, the Third Judge of the Provincial Court of *Patna*, when the following judgment was given :—" That the Defendant (present Appellant) admits, that the disputed *Dehauts* were sold to him conditionally, and yet he did not fulfil the conditions of Regulation XVII, 1806 A.D., to render the transactions a *bonâ fide* sale: and as to the second *Ikrar-namah*, executed by *Shah Shumsh-ood-deen*, the date of the execution of which is one day only before the death of the said *Shah*, which fact the Defendant does not deny, is invalid; in addition to which, according to the decision pronounced by the Sudder Dewanny Adawlut, a conveyance like this is not legal. Upon a consideration therefore of all the circumstances attendant on this transaction, the conditional sale stands in the character of a mortgage; it therefore becomes necessary to take up an account of the produce of the said *Dehauts*, and the principal and interest that is receivable by the Defendant;" for which reason it was ordered, that the Defendant should, within fifteen days, file the *Wasilaut** papers from the *Fusly* year 1814 to 1832, agreeably to the intent and meaning of Regulation XV of 1793.

The Appellant, *Jewun Doss Sahoo*, dissatisfied with this decision, presented a petition to the Provincial Court, praying that witnesses might be examined touching the execution of the second *Ikrar-namah*,

* Accounts showing the mesnè profits.

which the Court had in its Decree held to be illegal; but this application was refused, as the ground on which the *Ikrar-namah* had been deemed invalid had been recorded in the previous proceedings of the Court.

The Appellant took no steps to bring these Decrees under Appeal; but the subsequent proceedings in the Provincial Court, up to the Decree of Mr. *Steer*, of the 25th *June* 1827, related to the inquiries into the annual value of the property. The Appellant filed certain revenue papers called *Jumma-bundi* and *Jumma-khurch*, to show the collections received by him whilst he was in possession; and these papers were referred to the Provincial Court of Benares, (where the Defendant resided,) in order that they might take the Defendant's acknowledgment of their genuineness and accuracy. In pursuance of this reference, the Provincial Court of *Benares* summoned the Appellant, who, after procuring a delay of fifteen days, put in a petition, wherein he again insisted on the genuineness and legality of the *Ikrar-namah*, but did not produce any evidence in support of the *Jumma-bundi* and *Jumma-khurch* papers, though he swore to the entries therein being just and true.

On the 19th *September* 1826, the cause came on again before the Provincial Court of *Patna*, when an order was made to suspend the proceedings for one week, to allow the Plaintiff to produce evidence to falsify the *Jumma-bundi*.

During the prosecution of this cause in the Provincial Court, the Respondent had also been prosecuting against *Sultana* and *Ruheem-ood-deen* and others, a cause (No. 803) in the same Court, relating to the *Talook Ahunpore*, which contained some of the

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Mouzas originally granted for the expenses of the *Khankah*, and which were claimed by the Defendants in that suit, under an alleged sale by the Plaintiff's father.

That cause (No. 803) came on to be heard before *William Steer*, Esq., the Fourth Judge of the Provincial Court, on the 25th of *June* 1827, when deeming the case to be of the same nature as the present appeal, he proceeded to take both suits into consideration, and after stating the various documents already set forth, pronounced the following judgment:—"That if the conditional sale writing had stood, in that case a *bonâ fide* sale could not have been effected without acting up to the provisions of Regulation XVII, A.D. 1806; but as the conditional sale did not stand, but *Shah Shumsh-ood-deen* having taken a further sum of rupees 5,000, returned to the Defendant the *Ikrar-namah* which this individual had executed, purporting to be a conditional sale, and even executed in the Defendant's favour, another statement upon the subject thereof, which transaction made the affair terminate in a *bonâ fide* sale, and that circumstance took place more than fifteen years, reckoning to the period the suit was brought,—justice now demands, that after the lapse of so long a time, the Defendant shall not be deprived of the full and *bonâ fide* sale, and be dispossessed. As to the plea of the Plaintiff adduced at this time, after the period of limitation has gone by, that the *Ikrar-namah* dated the 13th of *Magh* 1217, F.S., (2nd of *February* 1810,) was written only one day before the demise of *Shah Shumsh-ood-deen*, because of the return of the *Ikrar-namah* executed by the Defendant under date the 3rd of the month of *Magh* 1214, F. S., (27th *January* 1807,) that cannot be admitted by the Court. Had

the assertion been founded on fact, it is certain that the objection would have been made at about the termination of the period of limitation, or before that time. There can be no doubt, besides, that in the manner the *Dehauts* and lands that were litigated in cause 803 have been sold, the *Dehauts* litigated in the present suit have been sold, in the character of a *bonâ fide* sale after the period of the conditional sale expired, and the grounds on which those lands were deemed not to be a *Wukf* endowment have been recorded in the proceedings holden in that cause. For the above reason it is ordered, that the Plaintiff's claim is dismissed, and he is rendered liable to pay the whole of the costs of suit."

The Respondent appealed from this decision to the Sudder Dewanny Adawlut, and filed his petition on the 23rd of *September* 1829.

The Appellant, *Jewun Doss Sahoo*, after objecting to the security of the Respondent, which was overruled, put in his answer to the appeal on the 30th *December* 1829.

On the 18th of *February* 1830, the cause, after some preliminary proceedings, came on for judgment before the Sudder Dewanny Adawlut, when the Court ordered and decreed that the claim and appeal of the Appellant (the present Respondent) should be decreed to him, and the decision of the *Patna* Provincial Court reversed; that the Appellant, (the present Respondent,) without being subject to the payment of the purchase-money, should be put in possession of the *Mahal* in dispute, and that the costs of both parties should be defrayed respectively by each.

From this Decree the present Appellant appealed to his late Majesty in Council.

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Mr. *Miller*, Q. C., Mr. *Wigram*, Q. C., and Mr. *Jackson*, for the Appellants.

This is a question of considerable importance, involving one of the most difficult points of Mahomedan law: it is the first of this nature that has been appealed to *England*. It resolves itself into three heads: *first*, whether the property which was purchased by the Appellant from the Respondent's father was of that description called *Wukf*, which is altogether inalienable, inasmuch as it is given to an institution of a religious nature for charitable purposes; *secondly*, assuming it to have been of that nature, whether the Respondent was competent to institute a suit for the recovery of the lands so alienated; and, *lastly*, whether the Respondent was not precluded and barred by the Appellant having held possession under a fair title, he being a purchaser for a valuable consideration without notice, for twelve years before the commencement of the suit.

I. It is necessary, in order to arrive at a true conclusion of the tenure of this property, to look at the language of the *Firmans* and *Sunuds*, by virtue of which the lands are held. The words of the first grant by *Mahomed Feroksir*, dated the 14th of *March* 1717, are, "that one lac of *dams* from *Pergunna Havilly Suhseram* in *sooba Bahar* are endowed and bestowed for the purpose of defraying the expenses of the *Khankah* of *Sheikh Kubeer*, *Dervish*," as an *Altamgha* grant, for "him to manage and control, and to descend to his heirs in succession from remove to remove." Now it is clear that the expression contained in this grant, "for the purpose of defraying the expenses of the *Khankah*," &c., is altogether destroyed by the limitation to the heirs: the grant is to *Sheikh Kubeer*, in the same way of limitation from remove to

remove. It seems strange that lands limited to heirs should have been treated by the Courts below as lands necessarily given for charitable purposes. The second grant of the third year of *Shah Alum* is in terms nearly similar, being granted as an "*Altamgha-inam* to *Sheikh Kiam-ood-deen*," "to descend to the offspring in succession to be enjoyed by them." It is apparent therefore that none of these grants establish the fact that the property in dispute is *Wukf*: on the contrary, the very instruments themselves show that they were granted to different persons "as an *Altamgha-inam*," which is a royal grant, perpetual and hereditary, "to descend to his (the grantee's) heirs in succession,"—terms which clearly convey a proprietary right. The term *Wukf* does not once occur in the grants; which moreover contain no declaration of trust whatever. The Court below has treated this in a way quite inconsistent with the notion of its being a trust: the doctrine of a Court of Equity is this—that if you want to fix a trust upon a property, you must show that the object is certain, and that it is given in such a way that the person to whom it is given upon trust shall not have power to dispose of it for his own benefit. In the grant of the third year of *Shah Alum*, it is said to be for the purpose of defraying the expenses of the frequenters to and from him, the grantee. Now this expression is perfectly appropriate in a grant to a *Dervish* for his personal benefit, without implying a perpetual foundation for eleemosynary uses: indeed, the words are mere common-place terms, and, in the absence of any other expression, not sufficient to render the donation a *Wukf* endowment. No proof whatever has been adduced, that the property in question was *Wukf* property.

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II. Now admitting this to have been *Wukf*, or endowed property, and to have been inalienable, still there is a fatal objection to the Respondent's claim; it never can be said that if property is improperly alienated, the party to undo the transaction is the person who conveyed it, or even those claiming under him, still more so when the Appellant insists that he is a purchaser for a valuable consideration without notice. The Respondent had no right to sue at all, for if this property was granted for charitable purposes, and really is of the nature of *Wukf*, the Government, whose duty is to provide that the endowments for pious and charitable purposes be applied according to their real intentions, alone can sue for the recovery of the *Mouzas*.

III. The claim of the Respondents is barred by section xiv. Regulation III. of 1793, and clauses first and third, section iii. of Regulation II. of 1805; inasmuch as the property in dispute has been held under a fair title within the meaning of those Regulations for upwards of twelve years before the institution of the suit. These Regulations are analogous to our Statute of Limitations, and by section ii. of Regulation II. of 1805, it is perfectly clear that twelve years is an absolute bar to every body except the Government, who may claim for sixty years. As there was no authority from the Government for the Respondent to sue for recovery of the *Mouzas*, and the property was held, and possession had, by the Appellant for upwards of twelve years before the commencement of the suit, his claim is barred and concluded by the Regulations.

Mr. Serjeant *Spankie*, Mr. *E. J. Lloyd*, and Mr. *Edmund F. Moore*, for the Respondents.

The first question raised by the Appellants is, whe-

ther this property is *Wukf*: that must be governed by the principles applying to grants of this nature provided for by the Mahomedan law.

I. In reading the grant by *Mahomed Feroksir* of the 14th of *March* 1717, no one for a moment can doubt but that the land was given for religious purposes: the words are, "A dignified and imperative *Firman* has been issued, that one lac of *dams* from *Pergunnah Havilly Suhseram* in *sooba Bahar*, which yields the sum of about 1,179 rupees to the Royal Treasury, are endowed and bestowed for the purpose of defraying the expenses of the *Khankah* of *Sheikh Kubeer*, as an *Altamgha* grant." The expressions in the second grant are much stronger, and show that the royal donor and founder, who was a Mahomedan, intended it for religious purposes: it states that a certain sum is to "be fixed as an *Altamgha-inam* to the sanctified *Sheikh Kiam-ood-deen* for the purpose of defraying the expenses of the frequenters to and from him, exempting the lands from the present assessment." The words, "to descend to the offspring in succession, to be enjoyed by them," does not convey a proprietary right, for it clearly is a mere trust, "for the purpose of defraying the expenses of the *Khankah*," which specifies the object and purposes for which it was granted to the offspring in succession as the mode in which it was to be held, as the establishment could not take care of itself. It is a grant for the *Khankah*, and the frequenters of it; a distinct appropriation to religious and charitable purposes, very common in *India*, to the memory of some eminently religious or holy person. Here an actual trust is created: the grant is to *Sheikh Kiam-ood-deen* as *Sijjada-nashin*, the superior of the endowed establishment, a corporation sole, in the nature

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of a trustee; he has no right to apply a portion to his own use; he is a corporation sole to carry on the establishment; he is not the person to be benefitted, he is only to give to it the effect which the founder intended, he is only entitled to participate in its benefit as *Sijjada-nashin*.

The objection next raised by the Appellants, namely, that the specification *Wukf* is not to be found in the grants, is of an extremely strict and refined nature. In Macnaghten's Mahomedan Law, *Wukf* is defined to be endowment, that is, appropriation of certain property to religious or useful, or what we should call, generally, charitable purposes:* if land, as in this case, is the subject matter, the profits are dedicated to religious objects. The *Hidaya*,† a book of authority on the Mahomedan law, treats largely upon *Wukf*, or appropriation, as it is there termed, which is declared, "in the language of the law, to signify the appropriation of a particular article in such a manner as subjects it to the rules of divine property, whence the appropriator's right in it is extinguished, and it becomes a property of God by the advantage of it resulting to his creatures." But it is unnecessary to pursue this argument further, as the case of *Mussumat Qadira, alias Mussummaŭt Usmut*, v. *Shah Kubeer-ood-deen*,‡ has already decided that this very property now under dispute was *Wukf*, or property appropriated to religious purposes; that by the use of the word *Inam* in a royal grant, it did not necessarily follow that the property specified was con-

* Macnaghten, Mah. Law, pp. 69, 329 and 338.

† *Hidaya*, vol. ii., pp. 334 and 344, translated by Hamilton. See also Col. Galloway's book on the Law and Constitution of India, p. 75.

‡ 3 Mac. Sud. Dew. R. 407.

veyed in absolute proprietary right, if from the general tenor of the instrument it could be inferred that a *Wukf*, or religious endowment, was intended. *Kulb Ali Hoossein* v. *Syf Ali** was to the same effect. These cases dispose of the whole question; they are most distinct authorities that the word *Wukf*, in a grant, is not necessary in order to constitute a religious appropriation for charitable purposes, provided the nature of the tenure be to be inferred from the nature of the grant. The same principles prevail in the *Hindoo* law.† This then being the law applicable to this species of tenure, it follows that the *Ikrar-namah* or deed of conveyance, whether conditional by way of mortgage, or absolute by sale, by *Shah Shumsh-ood-deen* was illegal, and consequently void.

II. The point raised, that the Appellant's father was a purchaser for valuable consideration without notice of the trusts, is untenable, and cannot be insisted upon here, inasmuch as it was never raised in any of the pleadings in the Courts below. The Appellant's father had every opportunity of investigating the title of the lands, and seeing the nature of the grants creating the trusts; if we can succeed in showing that this property is *Wukf*, or property devoted to charitable use, and impressed with a charitable trust; if the Appellant purchased without notice of the trusts, even supposing he gave a valuable consideration for the subject of the purchase, he could only take it subject to the trusts, and would himself become a trustee.

III. The remaining question is the limitation, which is also untenable; for it is obvious that this property,

* 2 Mac. Sud. Dew. R. 110.

† 4 Mac. Sud. Dew. R. 343. 2 Macnaghten's Hindoo Law, 305. 1 Strange's Hindoo Law, 151.

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being *Wukf*, comes within the exceptions contained in Regulation II. of 1805. It is important to consider the character of the Respondent, which makes, as to him, the question of time immaterial: the Respondent was not proprietor of the *Mouzas*, his appointment of *Mutwaly* or trustee of the *Khankah* by Government was not till the year 1819, when he alone became competent to sue for the recovery of these lands; therefore, the ordinary limitation of twelve years does not apply, as there was no one before that time competent to fulfil the trusts. It is clearly laid down, with reference to English suits, that if there is no party competent to entertain a suit, no time will run. *Murray* v. *The East India Company*.* Nothing appears in the proceedings to negative the presumption that the Respondent, the Plaintiff below, was duly authorized to institute the suit on his appointment as *Mutwaly*; and being so authorized, he was competent to institute the proceedings in his own name as *Mutwaly*, or procurator of the donor. Regulation XIX. of 1810.

Mr. Justice BOSANQUET:

Feb 15, 1841.

The Respondent in this case, on the 17th of *September* 1822, commenced a suit against the Appellant by plaint in the Provincial Court of *Patna*, to recover certain villages, alleged to have been inalienably appropriated by royal grant to the support of a *Khankah* or religious house, of which the Plaintiff was the superior or *Sijjada-nashin*.

These villages, on the 27th of *January* 1807, were transferred to the Defendant by *Shah Shumsh-ood-deen*, the Plaintiff's father, then the *Sijjada-nashin*, as a security for the repayment of a loan of rupees

* 5 B. & A. 204.

23,501, which transfer was absolute in form, but of which a defeazance (*Meadi-ikrar-namah*) was executed on the same day by the Defendant, and provided, that if the sum advanced should be repaid on or before *May* 1809, the sale should be void; if not, that the villages should become the absolute property of the Defendant. On the 2nd of *February* 1810, *Shah Shumsh-ood-deen*, in consideration of a further sum of rupees 5,000, executed another instrument, *Ikrar-namah*, purporting to convey the villages to the Defendant absolutely, and on the 5th of the same month *Shah Shumsh-ood-deen* died.

On the part of the Plaintiff it was contended that the property in question being granted for the maintenance of a religious establishment, was to be considered as *Wukf* or appropriated, and therefore inalienable; that if not inalienable, the transfer of 1807 was conditional in the nature of a mortgage, which, by the *Bengal* Regulation XVII. of the year 1806, could not be foreclosed or made absolute without taking certain proceedings, which were admitted not to have been taken in this case; that the transfer of 1810, which purported to be absolute, in consideration of the payment of rupees 5,000, was fraudulent and void, having been made by *Shah Shumsh-ood-deen* in his last illness, and shortly before his death, and consequently that the transfer of 1807, which was originally conditional, had never become absolute.

On the part of the Defendant, it was contended, that the property in question was not *Wukf*, but a proprietary interest given by royal authority to the grantees and their heirs as hereditary property, which they were at liberty to dispose of; that the transfer of 1807, admitted to be conditional, had, by the sale of

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1810, become absolute, notwithstanding the omission to take the proceedings prescribed by Regulation XVII. of 1806, such sale of 1810 being *bonâ fide*; and further, that having been made by *Shah Shumsh-ood-deen*, heir of the persons named in the royal grant as grantees, the right of the Plaintiff to sue for the recovery of the villages was barred by lapse of time, more than twelve years having elapsed from the time of the sale in *February* 1810, to the commencement of the suit in 1822, for which Regulations III. of 1793, and II. of 1805, were relied on.

The Plaintiff appears to have been under age at the death of his father in 1810, but in 1819 he was appointed by the Government to be *Mutwaly* or manager of the establishment, and *Sijjada-nashin* or superior thereof, at which time it is to be presumed that he had attained his majority.

The villages in question were granted by two royal *Firmans*, the first by *Mahomed Feroksir*, 14th *March* 1717, the second by *Shah Alum*, 13th *October* 1762.

The first of these instruments states, that a *Firman* has been issued, that one lac of *dams* from *Pergunnah Havilly Suhseram*, in *sooba Bahar*, which yields the sum of about 1,179 rupees to the Royal Treasury, are endowed and bestowed for the purpose of defraying the expenses of the *Khankah* of *Sheikh Kubeer*, *Dervish*, as an *Altamgha* grant, and that it shall be established according to the specification made therein. The children of the Sovereign, the *Amirs*, and those who transact the affairs of state, and the *Jaghiredars* and their successors, are enjoined to relinquish the said *dams* to the aforenamed individual for him to manage and controul, and to descend to his heirs in succession from remove to remove, and they are

required to consider the grant in every respect exempt from all contingencies, and not to demand from the said person a fresh *Sunud* annually. Upon this instrument a memorandum is endorsed, that one lac of *dams* have been granted by His Majesty as an *Altamgha*, for the use and expenses of the *Khankah* of *Sheikh Kubeer*, *Dervish*. .

In 1744, on the petition of *Sheikh Gholam Shurf-ood-deen*, the grandson of *Sheikh Kubeer*, who had succeeded him as the *Sijjada-nashin*, a *Perwannah* was granted by *Mahomed Shah*, enjoining the *Chowdries*, cultivators, &c., to consider the said one lac of *dams* as an *Altamgha-inam*, by virtue of the *Perwannah* of His Majesty, for the purpose of being appropriated to the charges of the travellers to and from the *Khankah* of the said *Sheikh Kubeer*, as it stood before, to descend to the offspring in succession, and to refrain from taking from the said *Gholam Shurf-ood-deen*, as was the rule before, the true and fair revenue payable to the state, and the *Dewanny* taxes, and enjoining them not to deviate from what may be for the benefit of the person in question.

The terms expressing the grant to have been made for the purpose of meeting the charges of the *Khankah*, and the travellers who frequent the *Sheikh Kubeer*, *Dervish*, are repeated several times in the endorsement.

A similar *Perwannah* was granted on the petition of *Sheikh Kiam-ood-deen*, the son of *Sheikh Gholam Shurf-ood-deen*, after the death of his father, and it is declared that *Sheikh Kiam-ood-deen* is established in the *Sijjada-nashin* in the same manner as his father and grandfather were.

The second instrument of the third year of *Shah Alum*, about the 18th of *October* 1762, is a grant,

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nearly similar in form, of two lacs and eighty-one thousand *dams*, the produce of which is rupees 3,000, to be fixed as an *Altamgha-inam* to the sanctified *Sheikh Kiam-ood-deen*, for the purpose of defraying the expenses of the frequenters to and from him, exempting the lands from the present assessment and from all that may be realized thereout by his good management; and the children and *Viziers*, &c., of the sovereign are enjoined always to maintain and uphold the said order, and to relinquish the aforesaid *dams* to them, to descend to the offspring in succession to be enjoyed by them, and deeming this grant free from the contingency of alteration or change, the public officers are not to demand anything from them upon the score of revenues or charges, and to consider the grant free of all *Dewanny* taxes, or for any writings whatever made on account of the state. Deeming this a full and positive injunction, they are not to demand a fresh *Sunud* annually, nor deviate from these royal and munificent orders.

Upon this instrument, a memorandum was endorsed that 281,000 *dams* have been granted by His Majesty in *Pergunnah Suhseram*, &c., as an *Altamgha-inam* to *Sheikh Kiam-ood-deen* for the charges of the *Fakirs*.

The proceedings in another suit commenced by the Plaintiff on the 6th of *April* 1821, against *Mussumat Beeby Ismut*, the widow of *Shah Shumsh-ood-deen*, to recover from her certain other villages comprised in the same royal grants, and claimed as *Wukf* property, were put in with the Decree of the Sudder Dewanny Adawlut of the 24th of *August* 1824, in which proceedings were set forth certain opinions of native law-officers respecting the nature of *Wukf* property taken under the authority of the Court.

The present cause being brought before Mr. *Fleming*, the Third Judge of the Provincial Court of *Patna*, on the 29th of *December* 1825, he determined, that as the disputed villages had been sold conditionally, and the conditions of Regulation XVII. of 1806 not fulfilled, the transaction could not be considered a *bonâ fide* sale; that the second *Ikrar-namah*, executed by *Shah Shumsh-ood-deen*, the date of which (he said) was one day only before the death of the said *Shah*, which fact, he says, the Defendant does not deny, is invalid, in addition to which, according to the decision pronounced by the Sudder Dewanny Adawlut, (i. e. in the suit against *Beeby Ismut*,) a conveyance like this is not legal. On consideration therefore of all the circumstances, he considered the conditional sale to stand in the character of a mortgage, that it was therefore necessary to take an account of the produce of the villages and of the principal and interest received by the Defendant, and therefore ordered him to file the *Wasilaut* papers.

On the 2nd of *February* 1826, the Defendant presented a petition to the Provincial Court, that witnesses might be examined in regard to the second *Ikrar-namah*. The cause coming on again before Mr. *Fleming* on the 19th of *September* 1826, he determined, that as the grounds on which the *Ikrar-namah* in question had been rendered null and void had been recorded in the proceedings holden on the 29th of *December* 1825, no further orders could be passed on that head; but on the Plaintiffs stating that the accounts of the Defendant were erroneous, it was ordered that the proceedings should be suspended: and Mr. *Fleming* having, on the 18th of *November* 1826, expressed suspicion respecting the genuineness of the accounts, thought proper to

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give time to the Plaintiff to falsify them, and as he was going the circuit, he directed the cause to be brought on before the Fourth Judge, before whom another cause connected with the present was pending.

On the 25th of *April* 1827, Mr. *Steer*, the Fourth Judge, ordered that an inquiry into the accounts should be made through the Collector of *Zillah Shahabad*, and a return was made by the Collector, the particulars of which it is not necessary to notice.

On the 25th of *June* 1827, Mr. *Steer* pronounced the following judgment:—That if the conditional sale writing had stood, in that case a *bonâ fide* sale could not have been effected without acting up to the provisions of Regulation XVII. of 1806; but as the conditional sale did not stand, by *Shah Shumsh-ood-deen* having taken a further sum of rupees 5,000, and returned to the Defendant the *Ikrar-namah* which this individual had executed, which circumstance had taken place more than fifteen years, reckoning to the period the suit was brought, justice demanded that, after the lapse of so long a time, the Defendant should not be deprived of the full and final *bonâ fide* sale; that after the period of limitation had gone by, the plea that the *Ikrar-namah*, dated the 2nd of *February* 1810, was written only one day before the demise of *Shah Shumsh-ood-deen*, could not be admitted; that the villages had been sold in the character of a *bonâ fide* sale after the period of a conditional sale expired; and that the grounds on which these lands were deemed not to be a *Wukf* endowment had been recorded in the proceedings holden in a cause No. 803. For these reasons he ordered that the Plaintiff's claim should be dismissed with costs of suit.

The Plaintiff having appealed from this judgment

to the Sudder Dewanny Adawlut, the appeal came on before Mr. *Ross*, Judge of the said Court, on the 30th of *January* 1830, who after stating the conditional and absolute bills of sale to the Defendants, the death of *Shah Shumsh-ood-deen*, and that after his death his widow, *Mussumat Kadira*, (*Beeby Ismut*,) held possession of the villages mentioned in the two *Firmans* till 1819, together with other property of the deceased as *Malikeh* or proprietress; that in 1819, the local agents knowing the villages mentioned in the two *Firmans* to be *Wukf* property, appropriated to religious purposes, appointed the Plaintiff to their management as procurator, who instituted a suit against her for these villages and others acquired by the profits of them; and that having proved their appropriation to religious endowments, (*Wukf*,) he obtained a Decree, which Decree, as proof of the property being an appropriation, (*Wukf*,) was affirmed by the Sudder Dewanny Adawlut; and after stating the proceedings instituted in the present suit, he proceeded thus:—As the villages in dispute were of the number mentioned in the two *Firmans*, according to which *Firmans*, on proof of the villages being *Wukf*, (appropriated,) the case No. 2,340 (*Mussumat Kadira*, Appellant, against *Shah Shumsh-ood-deen*, Respondent,) was decided by this Court on the 24th of *August* 1824, hence in this case two points demand consideration:—

1st. Whether *Shah Shumsh-ood-deen*, the villages in question being *Wukf* (appropriated) property, had or had not the right of alienating such *Wukf* (appropriated) property, either by *Bye-bil-wuffa* (conditional sale), by *Bye-meady* (absolute sale), or by any other sort of assignment. As to which he says, "The *Futwa* (law opinion) of the law-officers of this Court

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makes this point clear and manifest, viz., that a *Mutwaly* (procurator) has no right to alienate *Wukf* (or appropriated) property by *Bye-bil-wuffa* (conditional sale) or by any other kind of transfer."

2ndly. He says, "That from the 2nd of *February* 1810, the date of the *Ikrar-namah* (agreement bond) executed by *Shah Shumsh-ood-deen*, more than twelve years had elapsed; that *Mussumat Kadira* his widow, as *Malikeh* (proprietress), held possession of the property that had been seized of the aforesaid *Shah*, and that *Shah Kubeer-ood-deen*, in the month of *April* 1819, had been appointed *Mutwaly* (procurator), agreeably to the orders of the local agents."

Under these circumstances, he states the question to be whether the suit of the Plaintiff is or is not worthy of being entertained by the Court; and pronounces his opinion, that if from the date of the seizin by a person who believed the seller to have power to sell, and no usurpation or fraud was imputable to the seller, the right of the person seized would be well founded, agreeably to section iii. of Regulation II. of 1805, and he states that section xiv. of Regulation III. of 1793 would apply to his case; that the absolute sale of the 2nd of *February* 1810 was fully proved, and neither the Plaintiff nor any one for him, during the twelve years, demanded his right, nor did Defendant admit it or promise payment, nor did the Plaintiff advance his claim in any Court; that the Plaintiff did not appear to have been prevented by minority, having attained the age of majority in 1819, when he was appointed the superintendent of the *Wukf* property, three years before the commencement of the suit, and that with reference to section xiv. of Regulation III. of 1793, his claim was beyond the limit of cognizance.

As in this case, however, Government was neither Plaintiff, nor had the Appellants its sanction for instituting the suit, hence, in his judgment, section ii. of the Regulation II. of 1805 cannot be applied to this case, still, although the Government was not Plaintiff, yet in consequence of the property in question being *Wukf*, or appropriated property, and the Plaintiff appointed *Mutwaly* (procurator) by Government, for the management of the *Wukf* (appropriated) property, which is consecrated for the entertainment of travellers, he thought there was reason to question whether the provisions of section ii. Regulation II. could affect such a case or not; that up to the present period, no case of the kind had ever been tried by the Court, consequently the passing of a final order in this case by one Judge did not appear expedient. It was therefore ordered, that the papers for a final order should be laid before the two other Judges of the Court.

Mr. *Turnbull*, another Judge of the Sudder Dewanny Adawlut, before whom the cause was brought, having differed in opinion from Mr. *Ross*, on the 11th of *February* ordered the papers to be laid before another Judge. Accordingly it came before Mr. *Leicester* and himself on the 18th of *February* 1830, who after stating their opinion that Mr. *Steer* had no power to decide the case singly in opposition to the opinion of Mr. *Fleming*, but that he ought either to have postponed the case till the return of Mr. *Fleming*, or if he thought the inquiry by Mr. *Fleming* incomplete, to have recorded his opinion, and referred the case to the final order of another Judge; that his decision, founded on the authenticity of the *Ikrar-namah* of the 2nd of *February* 1810, which he pronounced to be authentic, without evidence, and of the verity of which strong

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suspicions appeared, was indeed extraordinary: since therefore the Decree of the Provincial Court could not be sanctioned, it became necessary to inquire into the merits of the Plaintiff's claim, and with that view to consider, First, whether an inquiry in regard to the *Ikrar-namah* of the 2nd of *February* 1810, in order to remove the objection of the Respondent by calling for evidence of its authenticity, was or was not necessary. As to which they say, "In our opinion, an inquiry in regard to the instrument in question is neither necessary nor beneficial to the cause of the Defendant; for in the event of the instrument in question on inquiry proving valid and authentic, yet the sale by the late *Shah Shumsh-ood-deen* of the villages mentioned in the instrument in question is altogether improper and illegal; for the villages in question are proved to be of the number of the *Wukf* or appropriated villages. In such a case the deceased *Shah* had no power by law to alienate them."

Secondly. Whether the claim of the Plaintiff, considering the lapse of twelve years from the date of the *Ikrar-namah*, was cognizable by the Court. On this question their opinion was, "That independently of the circumstance, that up to the present date the *Ikrar-namah* of *Bye-bat* (absolute sale) has not been proved in such wise as to change the aspect of the first or *Bye-bil-wuffa* (conditional sale), and that there appears no necessity to take evidence in regard to its authenticity, in consideration of *Shah Shumsh-ood-deen* having no power to alienate the villages in dispute, yet the *Ikrar-namah* in question, even if it were proved authentic, could not bar the claim of the Appellant, because the Appellant was appointed by the local agents to the offices of the *Mutwaly* (procurator)

and *Sijjada-nashin* (superior) of the *Khankah* or monastery of *Sheikh Kubeer, Dervish* in 1819." It is obvious therefore, they say, that from the date of his appointment, only the superintendence of the *Wukf* (appropriated) villages, appertaining to the *Khankah* in question, devolved to his care, and previous to that time he had no concern whatever with that matter. In such a case, agreeably to the intentions of section xiv. of Regulation III. of 1793, the claim of the Appellant in every way appears worthy of being entertained by the Court.

Thirdly. They say, "Although, according to usage in cases of *Bye-bil-wuffa* (conditional sale) it behoves that the purchase-money of *Bye-bil-wuffa* should be caused to be paid by the Plaintiff to the Defendant, after the latter shall have accounted for the *Wasilaut* (mesne profits) of the villages in dispute, yet as the estate in question was *la-khiraj* or rent free, and a profitable one, and has moreover been in the possession of the Respondent ever since the year 1806-7 up to the present time, a period of sixteen years, it is presumable that in such a length of time the purchase-money (principal and interest) must have been realized by the Defendant from the *Mahal* (district) in question. For this reason, and also in consideration of the seizin of the Defendant in the property in question being illegal, and the payment not lying in the Plaintiff, who is the *Mutwaly* (procurator) and superintendent, an ascertainment of the *Wasilaut* (mesne profits) is deemed unnecessary; but rather with a view of putting an end to the dispute, and the suffering of the parties, it is deemed proper that neither the purchase-money be caused to be paid by the Plaintiff to the Defendant, nor the

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Wasilaut money be demanded of the Defendant by the Plaintiff."

The Court therefore decreed in favour of the Plaintiff's claim, reversing the decision of the *Patna* Court, and directed the costs of the parties in both Courts to be defrayed respectively by each.

Such being the determination of the Court of Appeal, their Lordships are to consider whether that Court has determined rightly. First, that villages contained in the royal grants were to be considered as *Wukf*, and therefore inalienable in any manner whatsoever. Secondly, that notwithstanding the lapse of time, the Plaintiff, in the character of *Mutwaly*, to which he had been appointed by Government in 1819, was entitled to recover those villages. Thirdly, that as the possession of them by the Defendant was illegal, and as the Plaintiff was not the debtor of the Defendant, he was not bound to repay the money advanced. With respect to the determination that the Plaintiff ought not to have any account of the mesne profits, as the Plaintiff himself has made no complaint, it is unnecessary to consider it.

The question whether the property mentioned in the two royal grants was to be considered as *Wukf* or as a proprietary right was much discussed in the above-mentioned case of *Kubeer-ood-deen* (the present Plaintiff) against *Mussummaut Qadira*; and the opinions of the native law-officers taken in that cause being found to be contradictory, it became necessary to consult the *Futwas* of lawyers in cases formerly decided by the Court respecting *Wukf* endowments, and the decision of the Sudder Dewanny Adawlut of the 1st of *March* 1814, in the case *Kulb Ali Hoossein* v. *Syf Ali*, together with a *Futwa* of a former *Kazi-ool-Rouzet* of the

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Sudder Dewanny Adawlut, and of the *Moofti* of that Court, were referred to.

The terms of the *Firmans* of *Aulun Gheer* in that cause ran thus: "As it has come to the knowledge of His Majesty, that agreeably to a *Sunud*, furnished by the *Hakims*, certain *Mouzas* situate, &c., have been appropriated for the purpose of meeting the charges of *Fakeers* and students of the *Madrissa*, and the *Khankah* and *Musjid* of *Moolla Dervish Hoossein*, son of *Moolla Gholam Ali*, and the aforesaid individual is hopeful for the royal munificence and favour, his Majesty's royal commands are, that in the event of the aforesaid *Mouzas* being in the occupation and enjoyment of that individual, the whole of their *Mouzas* shall continue as they formerly were at *Jumma* of 15,000 *dams* from (such a date), in the character of a *Maddad Mash* (aid for subsistence), according to the tenor of the grant; and in order that he may apply the produce of these lands to meet the charges of the students of his *Madrissa* and *Musjid*, and the present and future *Hakims*, the *Amils*, &c., are enjoined to relinquish the *Mouza* in question to that person's occupation, to deem them *Maaf*, (exempt from tax,) and blotted with the pen in every respect, and not to require of him a fresh *Sunud* annually. Should that individual occupy anything in any other way, they are not to countenance him." Upon reading the *Firman*, the *Kazi-ool-Rouzat* and the *Moofti* gave their *Futwa* as follows: "As in the *Firman* it is written that the produce of the lands specified therein is to be applied to meet the charges of students of *Madrissa* and *Musjid* of *Moolla Dervish Hoossein*, and as it is not written that the said *Moolla* shall appropriate the produce to meet the charges of his family and children, or that he shall enjoy the

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same with his family and children, it therefore appears to us that the lands in question have been paid as *Wukf* in the character of *Maddad Mash*, and are not liable to sale or gift."

Agreeably to the above *Futwa*, the Judges of the Sudder Dewanny Adawlut decreed that the litigated lands contained in the *Firman* in question were a *Wukf* endowment, and were not disposable by sale or gift; the grounds of which Judgment (it is said) are fully stated in the Decree of that Court, under date *March* 1st, 1824.

It is to be observed, that the word *Wukf* was not mentioned in the *Firman*, and that the individual on whose application the grant was made, *Moolla Hoossein*, was expressly named. In the report of this case, (2 *Macnaghten*, 110,) it is said that the terms of the *Firman* declared that the general superintendence of the resources should be confided to *Dervish Hoossein*, and should remain vested in him, his heirs, and successors; or other property to pious and charitable purposes is sufficient to constitute *Wukf*, without the express use of that term in the grant, and that the alienation of such property, from the purposes intended, is illegal.

After referring to this case, and the opinions of the law-officers, the Sudder Dewanny Adawlut, in the case of *Mussummaut Qadira* v. *Shah Kubeer-ood-deen*, (3 Mac., Sud. Dew. R., 407,) appear to have determined, that notwithstanding the use of the words "*Inam*," and "*Altamgha*," in the royal grants, and the mention therein of the persons upon whose petition the grants were made, yet as these grants appeared clearly to have been made (as expressed in the petitions) for the purpose of maintaining

a charitable institution, the persons named were not to be considered proprietors; that the establishment (the *Khankah*) was the real donee, and the persons named were only *Mutwalies* of the *Khankah*; that a *Mutwaly* has no right to alienate, and consequently that the transfer by gift or otherwise by *Shah Shums-ood-deen* was illegal.

This decision is in accordance with the doctrine laid down in the *Hidaya*, book xv., of *Wukf* or appropriation, *Hamilton's* translation, vol. ii., page 334, where it is said, "*Wukf*" in its primitive sense means "detention." In the language of the law, (according to *Haneefa*,) it signifies the appropriation of any particular thing, in such a way that the appropriator's right in it shall continue, and the advantage of it go to some charitable purpose, in the manner of a loan. According to the two disciples, "*Wukf*" signifies the appropriation of a particular article in such a manner as subjects it to the rules of divine property, whence the appropriator's right in it is extinguished, and it becomes a property of God, by the advantage of it resulting to his creatures. The two disciples therefore hold appropriation to be absolute, though differing in this, that *Aboo Yoosaf* holds the appropriation to be absolute from the moment of its execution, whereas *Mahomed* holds it to be absolute only on the delivery of it to a *Mutwaly*, (or procurator,) and, consequently, that it cannot be disposed of by gift or sale, and that inheritance also does not obtain with respect to it. Thus the term *Wukf*, in its literal sense, comprehends all that is mentioned, both by *Haneefa*, and by the two disciples.

Again (page 344) it is said, "Upon an appropriation becoming valid or absolute, the sale or transfer of the thing appropriated is unlawful according to all lawyers: the transfer is unlawful, because of

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a saying of the Prophet, 'Bestow the actual land itself in charity in such a manner that it shall no longer be saleable or inheritable.'"

If the decision in the case of *Kubeer-ood-deen* v. *Mussumat Kadira* was correct, it follows that the transfer in this case, whether conditional or absolute, by the same person (*Shumsh-ood-deen*) to the Defendant, was illegal: also, secondly, with respect to the lapse of time, the Plaintiff, not being the proprietor, had no right to sue for the recovery of the villages as his own; accordingly, he preferred his suit as *Sijjada-nashin*, having been appointed *Mutwaly* in 1819. Had he succeeded as heir of his father to a proprietary right in the villages, he might have been barred by the lapse of twelve years, according to section xiv. of Regulation III. of 1793; but having no right except as *Mutwaly*, he stood in a very different situation. The superintendence of the *Wukf* villages devolved to his care from the date of his appointment only. The *Mutwaly* is the procurator of the donor, which, in this case, was the sovereign; and it appears, by Regulation XIX. of 1810, that it is the duty of every Government to provide, that the endowments for pious and beneficial purposes be applied according to their real intention: the local agents are appointed to ascertain and report the names of trustees, managers and superintendents, whether under the designation of *Mutwaly* or any other, and all vacancies, and to recommend fit persons where the nomination devolves on the Government. That the Board of Commissioners may appoint such persons or make such other provision for the superintendence, management or trust as may be thought fit. The Plaintiff therefore, upon his appointment as *Mutwaly*, became the authorized agent of the Government for the performance of the acknowledged

duty of the Government to protect the endowment from misapplication; for, as it is said in the opinion of the Mahomedan lawyers, "The endower and the *Mutwaly* are one and the same." The endowment in this case was a perpetual endowment, and the duty of the Government to preserve its application to the right use was a public and perpetual duty. By Regulation II. of 1805, section ii., it is provided, that the limitation of twelve years for the commencement of civil suits shall not be considered applicable to the commencement of any suits for the recovery of the public revenue, or for any public rights or claims whatever which may be instituted by or on behalf of the Government, with the sanction of the Governor-General in Council, or by direction of any public officer or officers who may be duly authorized to prosecute the same on the part of Government. The Plaintiff, who was neither heir nor personal representative of his father, in respect of *Wukf* property, had no right of action against the Defendant till his appointment in 1819, and the Defendant could acquire no right against the Government, whose procurator the Plaintiff was, at least until twelve years had elapsed from his appointment.

The endowment being a perpetual *Wukf*, and the alienation consequently illegal, and it not having been shown that the purchase-money was applied to the use of the *Khankah*, the Plaintiff cannot be required to account for it, even supposing the Defendant not to have been fully repaid by his long possession of the property.

Their Lordships are therefore of opinion, that the Judgment of the Sudder Dewanny Adawlut ought to be affirmed.

JESWUNT SING-JEE UBBY SING-JEE, and CHUTUR SING-JEE DEEP SING-JEE - - - - - - - *Appellants*,

v.

JET SING-JEE UBBY SING-JEE - - *Respondent.**

On Appeal from the Sudder Dewanny Court of Bombay.

7th Jan. 1841.

In a suit for possession of *Zemindary* and other estates claimed as son and heir of the deceased *Zemindar*, the Defendants denied the title of the Plaintiff, alleging, that he was a spurious and supposititious child, and tendered fifty-eight witnesses to prove that fact: the Zillah Court having taken the depositions of thirty of these witnesses, refused to permit the remaining twenty-eight to be examined, on the ground, that being to prove the facts deposed to by those already examined, it was unnecessary to take their depositions, and, ultimately, decided in favour of the Plaintiff: the Defendants appealed to the Sudder Court, which refused to examine the witnesses rejected by the Zillah, and affirmed the Decree of that Court. On Appeal to Her Majesty in Council, the Judicial Committee remitted the case back to the Sudder Court, being of opinion, that the refusal by that Court to admit the examination of the witnesses tendered, was irregular, and that no decision could be come to upon the merits under such circumstances.

ON the 20th of *June* 1825, the Respondent, *Jet Sing-jee*, by his mother and guardian *Baee Purtaba*, filed a plaint in the Zillah Court of *Broach* against the Appellants, *Jeswunt Sing-jee Ubby Sing-jee*, and *Chutur Sing-jee Deep Sing-jee*, the brother and nephew, and also against *Mussumat Gula Bhaee*, the widow of *Rana Ubby Sing-jee*, deceased, for recovery of *Zemindary* and other real and personal estates in the possession of *Juswunt Sing-jee Ubby Sing-jee*, belonging to the

* Present: Members of the *Judicial Committee*,—Lord Brougham, the Vice Chancellor, Mr. Justice Erskine, and the Right Hon. Dr. Lushington.

Privy Councillor,—*Assessor*,—Sir Edward Hyde East, Bart.

late *Rana Ubby Sing-jee*, and which the Respondent claimed to be entitled to as his son and heir.

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The Appellants, on the 5th of *December* 1825, filed separate answers to the plaint, insisting, among other things, that the Plaintiff *Jet Sing-jee* was not the son of the deceased *Rana Ubby Sing-jee*, but a spurious and supposititious child, the offspring of a slave, and setting up a deed of adoption, alleged to have been made by the late *Rana* in favour of the Defendant *Jeswunt Sing-jee Ubby Sing-jee*.

Gula Bhaee, the other Defendant, also filed an answer to the plaint, disclaiming any interest in the subject of the suit, other than the maintenance due to her as widow of the deceased *Rana Ubby Sing-jee*.

After the usual pleadings, documentary and oral evidence was produced on both sides. For the Plaintiff, witnesses were examined to prove his legitimacy, and the circumstances attending his birth and recognition by his deceased father. The Defendants summoned fifty-eight witnesses in support of their case. The depositions of sixteen of these witnesses having been taken, there being considerable delay on the part of the Defendants in producing the remaining forty-two, the Court directed the Defendants' vakeels to be asked what points these witnesses were to be called to prove, and upon receiving their answer, decided summarily that it was unnecessary to examine more than fourteen of these forty-two remaining witnesses, twenty-eight being to prove what had been already gone through by the sixteen first witnesses.

On the 22nd of *August* 1826, the Zillah Judge pronounced a Decree, part of which was in the following terms: "After a most attentive perusal of the whole of the documents filed, and evidence taken in

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this case, the Court is quite satisfied that Plaintiff has proved his claim to the *Guddy* of *Amod*; for, independent of the evidence and documents produced by the Plaintiff, the strong resemblance that *Jet Sing* bears to his deceased father, the latter of whom was personally known to the Judge when alive, is so great as to leave no doubt in the mind of the Court as to his being his legitimate son."

It was accordingly decreed that Plaintiff be put in full possession of the whole of the property of his deceased father *Ubby Sing-jee*, which was in the possession of the Defendants, each party bearing his own costs.

The Appellants appealed from this Decree to the Court of Sudder Dewanny, complaining, among other things, of the refusal by the Zillah Court, to take the evidence of the witnesses tendered. The Sudder Court however refused to admit this evidence, on the ground that its necessity was not made apparent to the Court, and affirmed the Decree of the Zillah Court of *Broach*.

From this Decree, the Appellants appealed to Her Majesty in Council.

Mr. *Miller*, Q. C., Mr. *Wigram*, Q. C., and Mr. *Jackson*, for the Appellant.

Mr. Serjeant *Spankie*, Mr. *E. J. Lloyd*, and Mr. *Edmund F. Moore*, for the Respondent.

The case having been opened,

Lord BROUGHAM,

On the part of their Lordships, expressed great doubt whether, after the refusal by the Zillah Court of *Broach* to permit the examination of twenty-eight witnesses

tendered by the present Appellants, and the refusal of the Sudder Court, who possessed the authority to remedy the error of the Zillah Court by calling them, the Judicial Committee could come to any decision on the merits; and after hearing the Respondent's counsel on that point, their Lordships determined to advise Her Majesty to remit the cause to the Sudder Dewanny Adawlut; being of opinion that the rejection of the evidence upon the supposition that it would go only to prove the same facts deposed to by the sixteen witnesses previously examined, viz., the spurious birth and supposititious character of the Plaintiff, the present Respondent, which facts, if proved, would have put an end to the case, was wholly irregular, and detrimental to justice, and that the decision of the Judge upon the personal resemblance of the Plaintiff to his deceased father could not be received or acted on by a Court of Appeal: they therefore resolved to remit the cause back to *India*, and advised the following order:—

"That the said cause be, and the same is hereby re-
"mitted back to the said Court of Sudder Dewanny
"Adawlut, as is therein set forth and recommended,
"whereof the Judges of the said Court of Sudder
"Dewanny Adawlut at *Surat*, for the time being, and
"all other persons whom it may concern, are to take
"notice and govern themselves accordingly."

EDWARD COBB MORGAN, CHARLES AUGUSTUS WEST, JAMES PATCH, JOHN PASCAL LARKINS, EDWARD ARMITAGE, and HENRY ALDERSON WOODHOUSE - - - - } *Appellants,*

AND

GEORGE WILLIAM LEECH - - *Respondent.**

On Appeal from the Supreme Court of Judicature at Bombay.

Heard exparte.

3rdDec.1840, & 11th & 12th Feb. 1841.

The Supreme Court of Judicature at *Bombay* has no power to admit persons as Attornies and Solicitors to practise in the Courts there, except such as are qualified in the manner pointed out by the Bombay Charter and Letters Patent of 1823, establishing the Court—viz., those who have been admitted Attornies or Solicitors in one of the Courts at *Westminster*, or were practising in the Recorder's Court at *Bombay*, at the time of the publication of that Charter.

THIS was an appeal respecting the admission of parties to practise as Attornies or Solicitors in the Supreme Court of *Bombay*, and involved the authority of the Judges of that Court to make an Order for their admission after having served for three years with an Attorney in *India*, without any previous service in *England*.

By the Charter and Letters Patent constituting the Supreme Court at *Bombay*, made by His late Majesty *George* IV., under the authority of 4 *Geo.* IV., c. 71, the Judges of the Supreme Court were authorized and

* Present: Lord Brougham, Lord Campbell, Mr. Justice Erskine, and the Right Hon. Dr. Lushington.

Semble. Where a matter has been referred by Her Majesty to the Judicial Committee, which is not strictly an appealable grievance, their Lordships may, under the reservations contained in the 3rd & 4th *Wm.* IV., c. 41, advise Her Majesty to grant the Petitioner leave to appeal.

empowered to prove, admit and enrol as Advocates and Attornies, such and so many persons as might be *bonâ fide* practising as such in the Court of the Recorder at *Bombay*, at the time of the publication of the Charter; and also as Advocates, such and so many persons, having been admitted Barristers-at-law, in *England* or *Ireland*; and as Attornies, such and so many persons, having been admitted Attornies or Solicitors in one of His Majesty's Courts at *Westminster*, as might to the said Court appear fit, according to such rules and qualifications as the said Court should for that purpose make and declare; to act as well in the character of Advocate as of Attornies in the said Court; and it was also expressly declared, that no other person or persons whosoever should be admitted to appear and plead, or act in the Supreme Court for and on behalf of any suitors: and it was further provided that no person, other than the persons *bonâ fide* practising as Advocates or Attornies in the Court of the Recorder at *Bombay* at the time of the publication of the Charter, should be capable of being admitted or enrolled, or of practising in the said Court, without the license of the East India Company for that purpose first had and obtained.

On the 13th *November* 1834, the Supreme Court of Judicature at *Bombay* made and published the following Order:—

"Any person desiring to be admitted as an Attorney, Solicitor or Proctor, shall produce a certificate of his having been admitted an Attorney or Solicitor in one of His Majesty's Courts at *Westminster*, or of his having served a regular clerkship of three years to an Attorney or Solicitor of one of the Supreme Courts in *India*, and also a certificate of his good character and ability, signed,

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in the first case, by the master with whom he shall have served his clerkship in *England*, and also by one of the principal officers of His Majesty's said Courts; and in the second case, by the master with whom he shall have served his clerkship in *India*, and also by one of the principal officers of the Supreme Court at the Presidency where such clerkship shall have been served."

This Order was similar to one made by the Supreme Court of *Madras*, which had been approved by the Chief Justice at *Calcutta*.

The Appellants, who were Attornies and Solicitors, duly admitted and enrolled in the Supreme Court at *Bombay*, and practising there, each of them having been previously admitted an Attorney of one of the Superior Courts at *Westminster*, presented a Memorial to His late Majesty against the above Order, as being in contravention of, and against the express terms of the Charter. The Memorial was referred to the Board of Control, and some correspondence took place between the Government and the Judges of the Supreme Court, but no proceedings were taken upon it: nor was any opinion given by the law-officers of the Crown or by the Privy Council upon its validity. The Judges of the Supreme Court were, however, directed by the Home authorities to address themselves, should they deem it advisable on the subject, to the Legislative Council of *India*.

On the 30th of *November* 1837, the Respondent (who had not been admitted an attorney or solicitor in either of the Courts at *Westminster*) presented a petition to the Supreme Court at *Bombay*, praying to be admitted an Attorney, Solicitor and Proctor of that Court. The petition was accompanied by a certificate of the

registry of his articles of clerkship for three years with *Henry Collins*, a Solicitor of the Supreme Court of *Bombay*, and a certificate of service under those articles, and one of good character and ability from his late master; and also from *Henry Roper*, clerk of the Crown at *Bombay*, and from *Daniel Bowden Smith*, Prothonotary and Register of the Supreme Court.

On the 21st of *December* 1837, an order was made by the Chief Justice, Sir *Herbert A. D. Compton*, in vacation, for the admission of the Respondent to practise as an Attorney, Solicitor and Proctor of the said Court.

On the 23rd of *February* 1838, a motion was made in the Supreme Court, on the affidavit of the Appellants, for a rule to show cause why the said order should not be discharged, and why the name of the Respondent should not be struck off the rolls of the said Court; the motion was supported by an affidavit of the facts above stated, and cause was shown on behalf of the Respondent in the first instance, and the Court having taken time to consider, on the 20th of *February* 1838 refused the motion.

The Appellants petitioned for, and obtained leave from the Supreme Court, to appeal against the above order and admission of the Respondent, to Her Majesty in Council, the prothonotary of the Court being ordered to transmit with the proceedings the original memorial presented by the Appellants against the order of the Judges of the Supreme Court, of the 13th of *November* 1834, with the following minutes of the Judges of the Supreme Court annexed to the memorial, and to which they referred as the answer of the Court to the present appeal. The minutes were as follows:—"The jurisdiction of the Supreme Courts in

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India having been declared by the legislature to be equal, and a rule respecting the future admission of Barristers and Attornies having been made and published by the Supreme Court at *Madras*, after having been approved of by the Chief Justice at *Calcutta*, it was deemed expedient to frame and publish a rule precisely similar for the admission of Barristers and Attornies in the Supreme Court at *Bombay*.

"The rule, so far as it is applicable to Attornies, has been complained of by seven of the members practising at *Bombay*, in a petition which is about to be transmitted to His Majesty in Council, and I deem it necessary to submit these observations, that they may accompany the rule to the authorities in *England*.

"Considering the different branches of jurisdiction that the Court is required to exercise, that most of the suitors at *Bombay* are either natives of the island, or persons who cannot speak or understand the English language, and that Hindoos and Mahomedans, in matters of contract and inheritance, are respectively entitled to have their own laws administered, it may I conceive be expected that persons who, during three years, may learn the practice of the Court in its different jurisdiction, who may require a knowledge of the language of the natives of *Bombay*, and who may thereby and otherwise become acquainted with their character, laws and usages, will, if in other respects duly qualified in conformity with the rule, and if admitted as Attornies, be enabled to communicate directly with the native suitors, to comprehend and to explain to them their rights and liabilities, to prevent unnecessary or vexatious proceedings in Court, and to conduct such as may be necessary or unavoidable in the quickest and least expensive manner: such persons,

by sympathizing with the interests, acquire the confidence of the native community, and thereby tend to arrest the progress of that dilatory and ruinous litigation which has been long complained of at *Bombay*.

"In forming my opinion respecting the expediency of adopting and of adhering to the part of the rule complained of, I have been in some degree influenced by the experience which I have derived from long practice at the bars of *Calcutta* and *Madras*. I believe that two-thirds of the Attornies who have practised in the Supreme Court at *Calcutta* during the last fifteen or twenty years, and many of them the most efficient and respectable, had never been admitted as Attornies in the Courts of *Westminster* or *Dublin*. A similar observation, although not to the like extent, may be applied to many persons who have been admitted to practise at *Madras*.

"H. A. D. COMPTON, C. J."

"*Bombay*, 18*th July* 1835."

"I concur in the opinion that the rule adopted by the Supreme Court at *Madras* is a fit guide for this Court. I think uniformity highly expedient, unless difference of circumstances demands that the rule should be barred. I think that great evil arises from the want of direct intercourse between Attorney and client, and as to the residue of the above observations, I am prevented from expressing an actual concurrence, not by dissent, but by not possessing the experience in which they originate.

"J. W. ANDRY, P. J."*

"*Bombay*, 20*th July* 1835."

* As this appeal was heard *exparte*, no counsel appearing for the Respondent, it is deemed right towards the Judges of the Supreme

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The appeal was referred in the usual form by Her Majesty in Council to the Judicial Committee; but upon its coming on its order to be heard, the Court* were of opinion that it not being in the nature of a judgment or determination, it was not an appealable grievance within the Charter, but that under the general powers of the 3rd & 4th *Wm.* IV., c. 41, and the terms of the reference, it was competent to them to advise Her Majesty to grant the Appellants leave to appeal, which was accordingly done: the appeal, therefore, now came on for final hearing.

Mr. Serjeant *Spankie* and Mr. *W. H. Watson* for the Appellants.

The Charter of 1823 prescribed the persons to be admitted Attornies, Solicitors and Proctors, to be such as had previously practised in the Recorder's Court, or had been admitted in one of the Supreme Courts of *Westminster*, and declares that no other person or persons shall be admitted: the Supreme Court have, therefore, no authority to make an order superseding the

Court to set out these minutes. It was submitted, however, on the papers, that the reasoning of the learned Judges was founded rather on the expediency and propriety of the rule than on its legality, or the power of the Supreme Court, under the provisions of the Charter, to make such an order. And it was observed that the Letters Patent constituting the Supreme Court at *Madras*, from whence the rule was copied, authorize and empower that Court to "admit and enrol such and so many persons having been admitted Attornies or Solicitors in one of our Courts at *Westminster, or being otherwise capable*;" and those constituting the Supreme Court at *Calcutta*, "empower the Judges to admit as many advocates and attornies-at-law as to them may seem meet;" while those constituting the Supreme Court at *Bombay* contain no provisions similar.

* Present: Lord Brougham, Mr. Justice Bosanquet, Mr. Justice Erskine, and the Right Honourable Dr. Lushington.

provisions of the Charter. If an Act of Parliament, or that which is equivalent to an Act of Parliament, enacts a particular mode of doing a thing, there is involved in that the negative of any other: a power, therefore, to the Supreme Court to admit Attornies certified and enrolled in the Courts of *Westminster*, is an absolute negative against the admission of any persons who do not come within that description. *Vin. Abr.*, 510, tit. Statute, E. 6, pl. 7. Where there is an affirmative that a particular mode is to be followed, as where an Act of Parliament introduces a punishment for a new offence, and says, the party shall be punished in a particular manner, the negative against any other mode is implied, and the party can only be indicted under that particular Statute. The principle is, that where there is an affirmative, that a particular mode is to be followed that is pregnant with a negative, that no other mode shall be followed.* In *Strading* v. *Morgan*,† there is this passage: "Wherefore, every Statute that limits a thing to be done in a particular form, although it be spoken in the affirmative, includes in itself a negative, viz., that it shall not be done otherwise." The Judges of the Supreme Court seem to think, that as it was the object of the legislature to equalize the Courts in *India* in point of jurisdiction, that therefore it was the intention of the legislature to enable all the Courts to do the same things, and that as the Statute 4 *Geo.* IV., c. 71, (under which the Supreme Court was established,) directed that the present Supreme Court "should," upon its being established, "do, execute, perform and fulfil all such acts, authorities, duties, matters and things whatsoever, as the said Supreme Court of *Fort William* is or may be law-

* Dwarris on Statutes, 641. Siderfin. 56. † Plowden, 206.

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fully authorized, empowered, or directed to do, execute, perform and fulfil within *Fort William* aforesaid," and that as the Supreme Court of *Fort William* were not limited in their power as to the admission of persons to practise as Attornies or Solicitors, other than those already admitted into the Courts of *Westminster*, that therefore they were to have equal power and discretion as to the admission of Attornies or Solicitors into their Courts of *Bombay*. But we submit, that the Statute merely makes the general jurisdiction of the Court, for the purposes of justice, similar to the powers and authorities exercised by the Courts at *Fort William*. But where the Charter gives a special qualification for Attornies or Solicitors, no general words in an Act of Parliament can overrule the express words of the Charter. The 3rd & 4th *Will.* IV., c. 85, sec. 115, does not alter the law in this respect, but rather confirms it, for there it takes away the necessity of obtaining the license of the Company, but gives no general power to the Court to admit. The 115th section provides, "Be it enacted, that it shall be lawful for any Court of Justice established by His Majesty's Charter in the said territories, to approve, admit, and enrol persons as barristers, advocates and attornies in such Court, without any license from the said Company." It is unnecessary to speculate upon the reasons of the Government in having made a difference in the *Bombay* Charter and that of *Madras*, (perhaps it was to prevent a great influx of Solicitors,) but we must take the Charter as it is, and unaffected by any subsequent Acts of Parliament; and we submit, that the construction of it is plain and obvious, and that no implied authority from the words of the Act, by virtue of which this Charter was granted, can control that plain and obvious con-

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struction. There is another objection to the admission of the Respondent, viz., that it was made by a single Judge at chambers, and in vacation, whereas it ought to have been an order of the whole Court, and made in term time. It appears also, from the papers, that the Respondent had, during his clerkship, acted as notary public, and also as common assignee to the Insolvent Court at *Bombay*; but it is not necessary to press these disqualifications: the Court had no power, as we contend, to admit him at all.

The Right Honourable Dr. LUSHINGTON:

19 Feb. 1842.

This is an Appeal from *Bombay*, and the circumstances which gave rise to it are the following:—

On the 13th day of *November* 1834, the Supreme Court of Judicature promulgated a rule as to the admission of Attornies to practise in that Court: that rule was in the terms set forth in the printed papers.*

On the 30th of *November* 1837, the Respondent, on the faith of this rule, petitioned the Court to be admitted as an Attorney to practise in that capacity, and he produced a certificate of registry of his articles of clerkship for three years, with a Solicitor of the Court, and also a certificate of service under those articles, and also of good character and ability from the same Solicitor, from the Clerk of the Crown in the Court, and from the Prothonotary and Registrar.

On the 21st of *December* 1837, the Chief Justice made an order for the admission of the Respondent to practise as an Attorney.

If the rule of Court of the 13th of *November* 1834 be a valid and legal rule, the Respondent was well admitted and entitled to practise.

* *Ante*, p. 429.

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Several of the Attornies already admitted and practising in the Court, however, entertained a contrary opinion; and conceiving that the admission of the Respondent was not warranted by law, and injurious to their own interests, on the 23rd of *February* 1838 moved the Court for a rule to show cause why the order of admission should not be discharged, and the Respondent struck off the Rolls; the Respondent immediately showed cause; the Court took time to consider, and on the 28th of *February* refused the motion. In other words, they held that the Respondent was duly admitted an Attorney of the Court.

The Appellants petitioned the Supreme Court for liberty to appeal against the order and admission, which was granted. At the hearing of the appeal here, the Respondent did not appear, and their Lordships have now to decide, whether the Appellants have stated sufficient grounds in law, to entitle them to a reversal of the orders appealed against.

Various applications have been set forth in the papers, to the Government at home, and other proceedings, the greater part of which cannot possibly enter into the consideration of their Lordships in the decision of this case; for the sole question to which they can direct their attention is, was the admission of the Respondent as an Attorney authorized by law or not?

In determining this question, our first consideration must be applied to the Charter, whereby the Court is constituted, and its proceedings regulated. That Charter is for those purposes equivalent to an Act of Parliament, and must be construed on the same principles.

The clause applicable to the general question is

in these words (the learned Judge here read the clause).*

Now this clause does three things: 1st, it provides for the admission into the Court, as newly constituted, of all persons howsoever qualified, who were practising at the time of the publication of the Charter: 2nd, it directs affirmatively who shall be admitted, and describes the qualifications they must possess: 3rd, it declares negatively that no person not possessing the stated qualification shall be admitted.

It seems difficult to understand how any doubt could be raised as to the meaning of a clause so clearly expressed; but from the papers in the Appendix, though the point has not been argued on the part of the Respondent, it appears that the Court at *Bombay* entertained the opinion, that the authority incident to a Court of Justice to regulate the appointment of its own practitioners was not restricted by this Charter. It is not said that the Charter could not restrict such power, whatever it may be, for that would be a proposition utterly untenable, but that the Charter duly construed produces no such effect. This at once brings back the whole question to the interpretation of the Charter. Now one of the first rules of construction is, that effect shall if possible be given to every part of the instrument; but if the proposition contended for by the Supreme Court at *Bombay* could be maintained, the consequence would be, that the negative part of the clause would be wholly inoperative. It is clearly impracticable to adopt a construction so wholly repugnant to the first principle of interpretation, and so repugnant to the plain meaning of the words. There is no room for argument that this Charter is merely directory of what shall be done, and therefore open to

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the possible construction, that what was permitted before, was still allowed; for it is not merely directory of what shall be done, but it is expressly declaratory of what shall not be done.

The meaning of the Charter being ascertained, the whole case is disposed of; for no question of convenience or inconvenience can in a clear case be allowed to have any weight.

It is needless to notice some other arguments which seem to have been advanced, viz., the reference which was made to another clause in this Charter, whereby a general power was given to make rules with regard to the general practice of the Court; because the general power contained in this Charter is clearly applicable to another and a different matter, and cannot be considered as overriding the express directions given in a clause peculiarly and exclusively applicable to the appointment of Solicitors in the Court. Again, a still further observation seems to have arisen with reference to the conclusion of the clause, which states, "And we do further ordain and declare, that no person from and after the date of these our letters patent, other than the said persons, being *bonâ fide* practising as Advocates or Attornies in the said Court of the Recorder of *Bombay* at the time of the publication of this our Charter, shall be capable of being admitted or enrolled, or of practising in the said Court, without the licence of the said United Company for that purpose first had and obtained." Now by a subsequent Statute* it appears that this clause was repealed and rescinded: but the whole effect of that subsequent Statute is to repeal this clause, leaving the remainder of the provisions with respect to the appointment of Advocates and Attornies in full and undiminished force.

* See 3 & 4 *Wm.* IV., c. 85, s. 115.

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It appears, therefore, to their Lordships that the Respondent not being qualified to be admitted according to the Charter, the Supreme Court had no power to exercise any further discretion in the matter, and that the appeal must be pronounced for, and the rule admitting him, and the rule refusing to strike him off the Rolls, rescinded.

RAJAH DEEDAR HOSSEIN - - *Appellant*,

AND

RANEE ZUHOOR-OON NISSA - - *Respondent*.*

On Appeal from the Sudder Dewanny Court of Bengal.†

19, 20, & 24 Feb. 1841.

THE question at issue in this Appeal was the right to a moiety of the *Zemindary* of *Pergunnah Soorjapore*, in *Zillah Purneah*, in the province of *Bengal*. *Rajah*

The family usage that a *Zemindary* has never been separated, but devolved entire on every succession, though proved to have existed as the custom for many generations, will not exempt the *Zemindary* from the operation of Reg. XI. of 1793, which provides in case of intestacy, for the division of landed estate among the heirs of the deceased, according to the *Mahomedan* or *Hindoo* law.

Reg. X. of 1800 does not apply to undivided *Zemindaries*, in which a custom prevails, that the inheritance should be indivisible, but only to *Jungle Mahals*, and other entire districts where local customs prevail; and therefore only partially, and to that extent, repeals Reg. XI. of 1793.

By Reg. IV. of 1793, it is provided, that in suits regarding succession, inheritances, marriage, and caste, and all religious usages and institutions, *Mahomedan* laws with respect to *Mahomedans*, and *Hindoo* laws with respect to *Hindoos*, are to be considered as the general rules by which Judges are to form their decision; according to the true construction of which the

* Present: Members of the *Judicial Committee*,—Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, Mr. Justice Erskine, and the Right Honourable Dr. Lushington.

Privy Councillor,—*Assessor*, Sir Edward Hyde East, Bart.

† Reported 3 Macnaghten's Sud. Dew. Rep. 46 & 164.

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Fookur-ood-deen Hossein, formerly *Zemindar* of *Pergunnah Soorjapore*, died on the first of the month of *Poos* 1200 *Moolky* (13th of *December* 1793), leaving two sons, *Rajah Akbar Hossein*, who was his eldest son, and *Rajah Deedar Hossein*, the Appellant. He left also a daughter, and the mothers of his two sons, and his own mother, surviving him.

Akbar Hossein married the Respondent, *Zuhoor-oon Nissa*, and died on the 13th of *Assin* 1221 *Moolky* (28th *September* 1813), leaving his widow and three daughters surviving him.

On the 1st of *January* 1815, the Appellant commenced an action in the *Moorshedabad* Provincial Court against the Respondent, for the purpose of being put into possession of one moiety of the aforesaid *Zemindary*, which was in the possession of the Respondent, and had been transferred into her name in the lifetime of *Akbar Hossein*, under an alleged bill of sale, bearing date the 17th of the month *Beh-*

Mahomedan law of each sect ought to prevail as to the litigants of that sect, and not the general or *Soonee Mahomedan* law.

In a suit, therefore, by a party in possession of one moiety of a *Zemindary*, for recovery of the other, on the ground that the estate was, according to the family rule, indivisible, it was held by the Judicial Committee, that the property not being a *Jungle Mahal*, within the provisions of Reg. X. of 1800, the family rule, if proved, was abrogated by Reg. XI. of 1793, and the title-deeds set up in the pleadings not being satisfactorily proved; that the descent must be governed according to Reg. IV. of 1793, by the laws of the religious sect to which the litigant parties belonged. The Judicial Committee, in affirming the judgment of the Court below, held the *Zemindary* divisible among the co-heirs of the deceased *Zemindar*, according to the laws of the *Sheeah* or *Imameean* sect of *Mahomedans* to which they belonged, according to which law, property descends to the daughters of a deceased brother, in preference to the surviving brother.

Where an appeal had been dismissed for want of prosecution, no step having been taken in it for ten years, the appeal was, upon Petition to the King in Council, restored, the Appellant paying the costs of dismissal and restoration; it appearing that the Appellant was ignorant of the proceedings necessary to be taken in this country, and had, though after the lapse of some years, instructed a commercial house in *Calcutta* to prosecute the appeal, but whose agent in *England* becoming insolvent, no proceedings were taken to bring the case to a hearing.

doon 1221 *Moolky* (28th *August* 1813), executed by *Akbar Hossein*, and by which he purported to sell the moiety of the *Zemindary* to the Respondent in consideration of her marriage-settlement.

The damages in the action were laid at 3,46,201 rupees, 8 anas, being the threefold of rupees 115,400. 8 anas, the annual *Jumma* (public assessment) of the estate.

The grounds of the action, as stated in the plaint, were, that the late *Rajah Fookur-ood-deen Hossein* did, agreeably to the *Wusseeyut* (declared wish) of his father and ancestors, make a Will to the following purport, that is to say, " of both my sons, whichever shall be the survivor, shall become the *Malek* and *Mokhtar* (the proprietor and comptroller) of the whole of the *Zemindary*, and shall maintain the remaining persons who may have claims," and that he legalized the Will by procuring to it the evidence of witnesses and the seal of the *Kazi*.* That after his death a *Sarbarakar* (manager) was appointed by the ruling powers for the purpose of taking care of *Akbar Hossein's* and the Appellant's property, and to manage the affairs of the *Zemindary* by reason of *Akbar Hossein* and the Appellant being of tender years; and that for their subsistence, and that of their paternal grandmother, and their two mothers, and their sister, a *Moshaira* (monthly stipend) was fixed by Mr. *Colebrooke*, the Judge of the *Zillah Purneah*, in which the property was situate. That when *Akbar Hossein* and the Appellant arrived at years of discretion, a requisition was made by the Board of Revenue, through the Collector of *Zillah Purneah*, of what their respective ages were, and of the genealogical table of their

* The *Mahomedan* Judge.

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ancestors, and that when their ages were ascertained, and the genealogical table gone into, a *Bundobust* (arrangement) was made with *Akbar Hossein* and the Appellant, by the orders of the ruling powers, from the *Bengal* year 1207 (1800-1), by virtue of the grant to them of one *Sunnud* (deed of grant), and the acceptance from them of one *Kabooliat* (engagement), and without separating either the *Jumma* (public assessment) or the lands of the *Zemindary*, which were continued whole and entire; and that upon consideration of the Will, the late paternal grandmother and sister of *Akbar Hossein* and the Appellant used during their lifetime to receive their *Moshaira*, and both their mothers to that day received their *Moshaira* to maintain themselves with. That this had been a practice of old, and had always been observed in the Appellant's family. That there was not between *Akbar Hossein* and the Appellant, disagreement or misunderstanding in any shape whatever, or any proposition as to a division of the *Zemindary*. That the bill of sale above referred to, and a deed of gift of *Akbar Hossein's* personal property in favour of his daughters, which had been executed at the same time with the bill of sale, had been procured by fraudulent means, and when *Akbar Hossein* was in a state of bodily and mental incapacity. That the *Zemindary* had, for fourteen generations together, devolved to the male offspring, and that no bill of sale or deed of gift had ever taken place among them. That the bill of sale and deed of gift had been framed by artifice and fraud, and were considered illegal according to law, and that by virtue of the Will and the *Kabooliat*, and the practice observed in the family, and the genealogical

table, the whole of the *Zemindary* was the right and title of the Appellant.

On the 25th of *July* 1815, the Respondent put in her answer to the plaint, to the effect, that she denied the Appellant's allegations as to the rule of the family, and the *Wusseeyut* (declared wish) of his ancestors, and the Will of the late *Rajah Fookur-ooddeen Hossein*; and as to the *Zemindary* not having been divided, and never having devolved to the female branch; and stated that the Appellant, in the lifetime and since the death of *Akbar Hossein*, had preferred divers petitions, whose purport was different from each other, to the Register, the Judge of the Zillah Court, the Collector of that place, the Board of Revenue, the *Moorshedabad* Provincial Court, and the Sudder Dewanny Adawlut, and that his representations had been clashing and inconsistent. That the non-portionment of the *Zemindary* was in violation of the Mahomedan law, and nullified the provisions of Regulation XI. of 1793.* That the non-division of the *Zemin-*

* Regulation XI. of 1793, after reciting that "a custom, originating in considerations of financial convenience, was established in these provinces under the native administrations, according to which some of the most extensive *Zemindaries* are not liable to division. Upon the death of the proprietor of one of these estates, it devolves entire to the eldest son or next heir of the deceased, to the exclusion of all other sons or relations," enacted, by sect. 2, that after the 1st of *July* 1794, if any *Zemindar* should die without a will, or without having declared, by a writing or verbally, to whom and in what manner his or her landed property was to devolve after his or her demise, and should leave two or more heirs, who by the *Mahomedan* or *Hindoo* law might be respectively entitled to succeed to a portion of the landed property of the deceased, such persons should succeed to the shares to which they might be so entitled; and by sect. 3 it was further enacted, that if one or more, or all of the sharers of such *Zemindar*, should be desirous of

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dary between the brothers of her husband's father and their ancestors, was owing to nothing, but that there had existed unbounded friendship and understanding. That as to the *Zemindary* being written in the names of the elder brothers during the minority of the younger brother, and that the younger brothers when they came of age made no dispute, this had happened because the whole of the younger brothers died without issue; but that had any of their issue existed, it would have become necessary to make an apportionment of the estate; and that for these reasons the

having separate possession of their respective shares, a division of the estate should be made in the manner directed in Regulation XXV. of 1793, and such sharer or sharers should have the separate possession of such share or shares accordingly; but if there should be three or more sharers, and any two or more of them should be desirous of holding their shares as a joint undivided estate, they should be permitted to keep their shares united accordingly. And by the same Regulation, sect. 4, it was also enacted, that if any two or more sharers should keep their shares united, a manager for their joint estate was to be appointed; and if any one or more of such sharers should apply to have the separate possession of his or their share or shares, the proportion of the public *Jumma* charged upon the whole estate which is to be assessed on such share or shares, was to be adjusted, according to the rules prescribed in sect. 10, Regulation I. 1793. And it was also provided, by sects. 5 and 6, that nothing contained in the said Regulation was to be construed to entitle any person to a share of an estate which might then be held entire by any individual, or that might devolve to any individual prior to 1st *July* 1794, in exclusion of the other heirs of the last proprietor, under the custom, nor to prohibit any actual proprietor of land bequeathing or transferring by Will, or by a declaration in writing or verbally, either prior or subsequent to the 1st *July* 1794, his or her landed estate entire to his or her eldest son or next heir, or other son or heir, in exclusion of all other sons or heirs, or to any person or persons, or two or more of his or her heirs, in exclusion of all other persons or heirs, in the proportions, and to be held in the manner which such proprietor might think proper.

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circumstance could be no ground of proof as to a rule in the family. That in fact the *Zemindary* in question used to be written only in the names of the elder sons of her husband's ancestors; and that if the Appellant adduced this instance as making out his case, he was not entitled to the half of the estate which he had in his possession. That the rule in former times in the families of great *Rajahs* of not dividing the *Raj*, which used only to devolve to the eldest son, was in opposition to the ordinances of the law, and the *Sastra*,* and was clearly the cause of the spoliation of the rights of other heirs; and that Regulation XI. of 1793 had been enacted for the purpose of doing away and cancelling such rule. That in fact when her late husband and the Appellant were infants, Mr. *Colebrooke*, the Judge of *Zillah Purneah*, fixed the *Zemindary* in question in the joint names of her husband and the Appellant, under the provisions of the said Regulation, and appointed a manager. That after her husband came of age, he, upon consideration of the ordinances and the law, and the Regulations of Government, made no altercation; but in conjunction with the Appellant, preferred a *Durkhast* (petition) for a *Khood-bundobust* (a settlement made by Government direct with the landlord), and, agreeably to the prayer of the petition presented by both the brothers, a *Tahud* of (agreement for) the *Zemindary* in question was given to both brothers in the shape of *Khood-bundobust* in the year 1207 B. S. (1800-1); and her late husband and the Appellant, in order that an efficient management of the estate might take place, and because there was no misunderstanding between them,

* The *Dharma Sastra*, the code of law, consisting of the text-books and commentaries.

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appointed *Baboo Sookh Lal* their *Sarbarakar*, and making the collections through him, used every year to take one moiety of the profits which accrued. And that under the provisions contained in the fifth section of the above Regulation, this could not be overturned. That the Appellant's assertion that the *Zemindary* never devolved to the female part of the family was erroneous; and that the medium through which the *Zemindary* came into the hands of *Mahomed Saeed*, the father of the great grandfather of her late husband, was through his inheriting from *Beeby Rowsheen*, his wife. That the Appellant's allegation of the *Wusseeyut* of his ancestors and the Will of his father, were fabrications, and in discord with all the *Durkhasts* (petitions) which he had presented. That if there was in reality a Will, the Appellant could not have had the least dread of the bill of sale and deed of gift; and that the existence of such an instrument could not be reconciled, with the opposition to the bill of sale and deed of gift, by pleadings which were inconsistent with each other. That it had been a rule of long standing, that when a *Rajah* or *Zemindar* made a Will, as to the disposal of his effects or estates, he immediately made a communication of the circumstance to the Government; and that had the Will, which the Appellant alleged, been a true one, he would have made a report respecting it to the ruling power; and when he opposed the bill of sale and deed of gift being registered, would have produced it; that he neither produced or made mention of it before the register, or the collector, or the Judge of the *Zillah*, or the Board of Revenue, or the *Moorshedabad* Provincial Court, or the Sudder Dewanny Adawlut; and that there could be no doubt, therefore, of its

being a forgery. That if the *Wusseeyut* and Will, alleged by the Appellant, were genuine, and the Appellant had conceived himself entitled to the whole of the *Zemindary*, under the rule observed in his family, and if it had not been customary that portions of the *Zemindary* went to the female branch, the Appellant would not have obtained from his Mothers two bills of sale and deeds of gift, specifying in them their rights and portions, and procured to them the seal of the *Kazi*, and got them registered by the register; and that it was clear, therefore, that, antecedent to that affair, there was no *Wusseeyut* or Will. The Respondent by her answer, further stated, that during the lifetime of her late husband, the Appellant brought actions, for an account of the charges incurred in the *Iman-bara* (religious establishment) and of his share in the goods and jewels of his paternal grandmother; and that whilst his brother was living, the Appellant presented a petition to the Judge, setting forth that he had two suits pending against his brother; and that as his brother was selling and giving away by grant the whole of the *Zemindary* and effects, and was making a transfer of names, there would be no assets to answer the decrees in such causes, if given in his favour. That the Appellant had also presented a petition to the Board of Revenue, praying that a *Sarbarakar* should be deputed, and agreeing to account to her for the receipts and disbursements, and to furnish her with her necessary expenses. The Respondent by her answer, also denied the allegations of the plaint, as to the bill of sale and deed of gift having been obtained by fraud, and as to the incompetency of *Akbar Hossein*, and asserted the bill of sale and deed of gift to be good and legal instruments.

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The Appellant filed a replication to the answer, enlarging upon the grounds stated in the plaint, and alleging that there had been a writing between him and his late brother in support of the *Wusseeyut* of their ancestors.

The Respondent rejoined, answering in detail the allegations of the replication, and suggesting that the alleged writing between the Appellant and his brother was fabricated. The rejoinder also alleged, that, according to the *Futwas* (opinions of the law-officers), and the texts on which the *Futwas* were founded, a *Wusseeyut* is not legal when made in favour of an heir.

Much documentary evidence was adduced, and many witnesses examined, both on the part of the Appellant and of the Respondent.

Amongst the documents exhibited by the Appellant, was one, purporting to be a copy of a copy of the alleged Will of *Rajah Fookur-ood-deen Hossein*, bearing date the 15th of *Magh* 1199, B. S. (25th *January* 1793), recorded in the collector's office, and an instrument purporting to be an *Ikrar-namah* (compact or agreement) under the seals of *Akbar Hossein* and the Appellant, bearing date the 11th *Assin* 1217 *Moolky* (2nd *October* 1810), to the following effect: "We, *Akbar Hossein* and *Deedar Hossein*, sons of "the deceased *Rajah Fookur-ood-deen Hossein*, inhabi- "tant of *Kusba Khugra*, in *Pergunnah Soorjapore*, "while in sound health and in the possession of our "faculties, and while equal to all legal acts, do make "this good and legal declaration, that among our fore- "fathers there never has a division been made of the "*Zemindary*. On the other hand a division of the "*Zemindary* has been forbidden to be made, and there

" are *Wusseeyut-namahs* of our ancestors, made by the " agreement of heirs to the following effect, that is to " say, the *Zemindary* of us the contracting parties has " never been divided among the heirs, nor will this " ever be done. And upon the rule observed in the " family, and by the *Wusseeyut-namahs* of our proge- " nitors, such person from among the male line, as " shall be the survivor, shall be in the occupation, and " the *Malik* and *Mookhtar* of the whole *Zemindary*, and " shall maintain the other heirs who may be entitled to " it. In fact, our father, going upon the rule observed in " our family, has executed a *Wusseeyut-namah*, and after " the death of our father, during the time we were in- " fants, there was a *Sarbarakar* appointed to the whole " of our *Zemindary*, by order of the Court of Wards. " Now that we have come to years of discretion and of " age, We do, by the agreement of the heirs, and in " pursuance of the rule observed in our family, agree " and give in writing, that while both of us brothers " exist, we shall keep the *Zemindary* in our control; " and we shall never divide and take the *Zemindary*. " There shall be on the part of both brothers a *Sarba-* " *rakar* in the *Zemindary*, who shall pay in the public " revenues, and shall pay over to both of us brothers, " the profits that may accrue therefrom. And (God " forbid) whichever of both of us brothers shall die " first, and shall leave no son, his heirs shall have no " power to claim the *Zemindary* left, and they shall, " upon the custom observed in the family, receive " a stipend only for their subsistence; and the bro- " ther who shall survive shall continue *Malik* and " *Mookhtar* of the whole *Zemindary*, &c., upon the " rule of the family, and the *Wusseeyut* of our ances- " tors. These few lines have been written as an

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" admission of the *Wusseeyut* in question, that at the " time of need they may prove serviceable." It appeared, however, that the copy of the said alleged Will, recorded in the collector's office, had not the collector's signature; and there were discrepancies in the evidence of the witnesses who were examined on the subject of the *Ikrar-namah*. In support of the alleged rule of the family, the Appellant also exhibited a rejoinder, filed by *Rajah Akbar Hossein*, in a suit instituted by his mother against him, and in which it was contended that he had admitted the rule of the family, and a genealogical table of the family. It appeared, however, by this table, and by other evidence, that the *Zemindary* had not always devolved to the male branch of the family, and that the Appellant's and his late brother *Akbar Hossein's*, and their father *Fookur-ood-deen Hossein's*, right in the *Zemindary* had sprung from *Mussumut Rowsheen Beby*, who was married to *Mahomed Saeed*, the Appellant's and *Akbar Hossein's* great grandfather.

The documentary evidence, on the part of the Respondent, consisted for the most part of the proceedings and instruments referred to in her answer to the plaint. The parol evidence on both sides related almost exclusively to the circumstances attending the execution of the bill of sale and deed of gift, and to the capacity of *Akbar Hossein* at the time when they were executed.

In the course of the proceedings in the *Moorshedabad* Provincial Court, the *Moulavie** of the City Court of *Moorshedabad* was consulted as to the validity of the alleged Will of *Rajah Fookur-ood-deen Hossein*, and of the bill of sale and deed of gift; and, from the answer given by him, it appeared that the Will could

* Mahomedan lawyer.

not be upheld by the Mahomedan law, but that the bill of sale and deed of gift were good and legal. The same *Moulavie* was afterwards further consulted on the question, whether, supposing the *Ikrar-namah* to be genuine, the bill of sale and deed of gift would be valid, and he gave his opinion that the *Ikrar-namah* was, according to the Mahomedan law, a Will made by *Akbar Hossein* and *Deedar Hossein*; and that according to law, it was legal for a testator to turn from his Will, and that *Akbar Hossein* having made a sale to his wife, and a donation to his daughters, showed that he had turned from his Will, and that the sale and donation made by *Akbar Hossein*, in favour of his wife and daughters, subsequently to the execution of the *Ikrar-namah*, were not invalid, according to law.

The cause was heard in the *Moorshedabad* Provincial Court at different dates, and on the 27th of *August* 1817, the senior Judge of the Court gave judgment, by which, after observing on the evidence, and the suspicion which attached to the alleged Will and *Ikrar-namah*, and stating his opinion that it had been fully proved that *Rajah Akbar Hossein* executed the bill of sale and deed of gift while in possession of his reason and intellect, he concluded, that as, according to the *Shura*,* the Will of *Rajah Fookur-ood-deen Hossein* was invalid and null, and as the *Ikrar-namah* did not vitiate or render null and void *Akbar Hossein's* sale and donation, the Appellant's claim was ill-placed and improper; and the Respondent's right and title to one moiety of the *Zemindary*, which had been sold to her, was just and proper. And it was accordingly ordered, that the cause be dismissed, and that the Respondent

* The Mahomedan law.

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continue in possession of one half-share of the *Zemindary*, and that the Appellant refrain from interfering or meddling in it, and pay the costs.

The Appellant, being dissatisfied with this decision, appealed to the Sudder Dewanny Adawlut.

The cause was heard by *John Fendall*, Esquire, the then chief Judge of the Court, and by *S. T. Goad*, Esquire, the Fourth Judge, at different dates; and on the 24th of *May* 1820, judgment was pronounced by the Fourth Judge. The judgment was to the effect, that there was no doubt that the alleged Will of *Rajah Fookur-ood-deen Hossein*, and the alleged *Ikrar-namah*, were fabrications and forgeries, and therefore that the Appellant's claim was such as should be dismissed; but that, as the First Judge of the *Moorshedabad* Provincial Court had given a Decree to the Respondent, for one moiety of the *Zemindary*, it was proper, before affirming the decision, to ascertain the validity of the bill of sale; that under the circumstances the bill of sale had not been established; and, admitting it to be legal according to the Mahomedan law, could not be taken as a sufficient ground to affirm the decision given by the Provincial Court; and that it therefore became necessary to divide the *Zemindary* according to the *Furraiz* (law of division) among the heirs of the defunct. That the assertion that the *Zemindary* always devolved to the male branch of the family, and never went to the female, had not been established; for that it had been shown that the Appellant's and his late brother *Akbar Hossein's*, also their father *Fookur-ood-deen Hossein's*, right in the *Zemindary* had sprung from *Mussumut Rowsheen Beeby*, who was married to *Mahomed Saeed*, the Appellant's and *Akbar Hossein's* great grandfather. That the

Appellant had fabricated a *Wusseeyut-namah*, in order to prove the rule observed in his family; and that had there been this rule in the Appellant's family, it was not necessary to write a *Wusseeyut-namah* and an *Ikrar-namah*, and that hence it was clear that the rule never existed in the Appellant's family. That it appeared therefore to be fit and proper that the genealogical table, filed in the cause, be laid before the Mahomedan law-officers of the Court, in order to their propounding the law, as to how many *Sahams* (shares) the *Zemindary* left by *Rajah Akbar Hossein* should be divided into, and how many *Sahams* should go to the heirs of *Akbar Hossein*, and to which, particularizing the *Sahams* to each; but as that opinion was not in agreement with the opinion of the First Judge of the *Moorshedabad* Provincial Court, recorded in the Decree of the 27th of *August* 1817, and on that account the decision of the Provincial Court seemed to be such as should be reversed and annulled, it was ordered that the papers in the cause, with that proceeding, should be laid before another Judge of the Sudder Dewanny Adawlut, so that should the Judge's opinion agree with that then given, the Decree of the Provincial Court might be reversed and annulled, and a final order passed to bestow the property left by *Rajah Akbar Hossein* to his heirs under the *Furraiz*.

The cause then came on before *Courtney Smith*, Esquire, the Officiating Judge of the Court. In the course of the proceedings before this Judge, a search was directed for cases decided in the Sudder Dewanny Adawlut, in which orders had been given that the real property should not be divided among the heirs, notwithstanding the enactment of the Regulation XI. 1793; and for the purpose of ascertaining what had

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been done by the Court on former occasions in regard to marriage-settlements made on wives. And the records of the following cases were produced, namely, the cause *Isshanchund Roy* v. *Isshurchund Roy*, decided on the 23rd of *February* 1792; *Ramgunga Deo* v. *Doorgamunee Jobraj*, decided on the 24th of *March* 1809;* *Baboo Ishurrepershand Sing* v. *Baboo Saheb Zada Sing*, decided on the 26th of *May* 1803; *Koonwur Bodh Singh and others* v. *Seonath Singh*, decided on the 17th of *November* 1813;† *Gungagoond Sing* v. *Rajah Madho Sing*, decided on the 4th of *June* 1804; *Gholam Husun Ali* v. *Zeinul Beebee*, decided on the 20th of *July* 1801;‡ *Ali Buksh Khan* v. *Kaeem Beebee*, decided on the 24th of *August* 1804;§ *Mirza Moohummud and Hyaut-o-nissa* v. *Jareut-oz-Zohra and others*, decided on the 22nd of *July* 1808;‖ *Wujih-on Nissa Khanum* v. *Mirza Husun Ali*, decided on the 30th of *December* 1808;¶ *Omduton-nissa Begum* v. *Mirza Asud Ali*, decided on the 19th of *May* 1809;** *Meer Nujib-oollah* v. *Mussummaut Doordana Khatoon*, decided on the 21st of *August* 1805.††

Petitions were also presented by the Appellant and the Respondent; the Appellant by his petition insisting on his title as founded on the family rule, and contending that the rule was not repugnant to the Mahomedan law, or to Regulation XI. of 1793. And the Respondent, by her petition, contending, that any rule which might be observed in a family, directing that a *Zemindary* should not be divided, went for no-

* 1 Macnaghten, Sud. Dew. Rep. 270.
† 2 Macnaghten, 92.
‡ 1 Macnaghten, 48.
§ 1 Macnaghten, 83.
‖ 1 Macnaghten, 243.
¶ 1 Macnaghten, 266.
** 1 Macnaghten, 276.
†† 1 Macnaghten, 103.

thing when opposed to the Mahomedan law. That Regulation XI. of 1793, completely overturned this mischievous rule. That as after the death of *Fookur-ood-deen Hossein*, the father of *Akbar Hossein* and *Deedar Hossein*, both the brothers of their own free will caused their names to be jointly written in the collector's office with respect to the *Zemindary* in question; and as they continued in joint possession in the *Mofussil* (provinces), it was clear that, had such a rule existed, both the brothers had of their own free will and pleasure overturned it; and that the Appellant had not claimed in the suit on his rights as heir, and that no inquiry as to those rights ought to be made. The Appellant also in the course of the proceedings before the Judge, filed a law opinion in support of his claim.

On the 14th *June* 1820, *Courtney Smith*, Esquire, the Officiating Judge, gave judgment to the effect, "that there was a failure of proof of the bill of sale, and that it was presumable that it had been fabricated, but that had *Rajah Akbar Hossein* executed it, it would not have been upheld as legal, for that it was diametrically opposite to the rule of the family, according to which the amount of the marriage-settlement of the wives could not be answered from the *Zemindary*. That from all the circumstances and bearings of the case, it appeared manifest, that it never was the rule, and that the family of the *Rajahs* of *Soorjapore* had not the power of paying the amount of marriage-settlements made on their wives from the *Zemindary*. That it was not the rule of the family that the female part of the family should have any concern or power in the *Zemindary*. That the alleged Will and *Ikrar-namah* had not been established as they ought to have been, but that the want of proof of these papers did

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not affect the proof of the family rule. That Regulation XI. of 1793 did not in any respect bar a Decree in favour of the Appellant or his claim. That the Appellant's claim was clearly established, and that the bill of sale exhibited by the Respondent had turned out to be altogether false, and that it was therefore necessary that the Decree of the Provincial Court, dated the 27th of *August* 1817, should be annulled, and that orders should be given that the Appellant should have possession of the whole of the *Zemindary*, and that the Respondent should account to him for the *Wasilaut*, (receipts and disbursements,) and should pay the costs of the suit. Also, that the Appellant should, agreeably to the family rule, maintain and support the Respondent according to her rank and situation in life; but as the opinion then given was repugnant to that of the Judge who before sat on the case, it was ordered that the papers should be laid before a third Judge."

The cause accordingly came on before Sir *James Edward Colebroke*, the then Chief Judge of the Court, and on the 4th of *August* 1820 he gave his judgment, "agreeing with that which had been given by the Officiating Judge, (*Courtney Smith*, Esquire,) and by a Decree of the Sudder Dewanny Adawlut, dated the 4th of *August* 1820, it was ordered and decreed, that the decision of the First Judge of the *Moorshedabad* Provincial Court, dated the 27th of *August* 1817, should be reversed and annulled, and that the Appellant should be put into possession of the whole of the *Zemindary*, and that the Respondent should account to the Appellant for her receipts and disbursements during the period she was in possession, and pay the costs of the suit on both sides, and that the Appellant

should, according to the rule, maintain and support the Respondent according to her situation and rank in life."

The Respondent afterwards preferred a petition, praying a review of the judgment, and the petition having been granted, the cause was again set down, and was heard by *William Leycester*, Esq., the then Chief Judge of the Court, on the 21st of *January* 1822, when he gave judgment as follows: "Upon a consideration of the whole of the papers in this case, and upon a deliberation of all the circumstances of the case, to the sitting Judge it does not appear that the rule of the family alleged by the Appellant has been established in the manner it should have been, or so as to satisfy a Court of Adawlut: admitting however that it were proved, it is not valid under the Regulations in force; on the other hand, it is manifest that it is prohibited by Regulation XI. of 1793. This Regulation however does not bear upon the eleven cases which have been decided by this Court, and adverted to as precedents in their proceedings, under date the 6th of *June* 1820. The provisions of that Regulation can only apply to periods subsequent to its enactment, and not to times antecedent to it. And if the Regulations in question have no reference to the case, it is like a blank piece of paper, without purport or meaning. Admitting that the rule of the family was in force (as stated by the Appellant) anterior to the death of *Fookur-ood-deen Hossein*, yet, since that person's demise, it has ceased and died away; for seeing, subsequently to the death of the said *Fookur-ood-deen Hossein*, his sons, that is to say, the Appellant and the late *Akbar Hossein*, appointed, in understanding with each other, *Baboo Sookh Lal*, the

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Sarbarakar of the litigated *Zemindary*, and have received each one moiety of the profits thereof, where in such case remains the rule of the family which the Appellant makes his hold, on which he alleges that it should not be divided, and has put his claim in upon it? And the degree of degradation to which the rank of the family would be subjected to by a division of the *Zemindary* would be the same in a division of its profits, seeing there is no distinction or difference between a division of a *Zemindary* and that of its profits: on the other hand, they are one and the same. Had the late *Akbar Hossein* left five sons as his heirs, even they would, as their father might have deemed good, have been in unity with each other, and would have made an equal division of the profits of the *Zemindary*. In like manner, had the Appellant himself five sons, they would have divided equally among themselves, in which case too the rank of the family would in a very short time have dwindled away. The best of it is, that when an equal division of the profits was made between the late *Akbar Hossein* and the Appellant, the latter made no allusion to the family rule, nor did he say, that, agreeably to the rule of the family, he was not entitled to the one moiety portion. On the other hand, he did, with the greatest joy and pleasure, receive one-half of the whole of the profits of the *Zemindary* up to the time of the death of *Akbar Hossein*, in opposition to the family rule or his father's desire which he now contends for, by which it is manifest and stands proved, that the alleged rule of the family had no ground or existence, and that it continued no longer in force. Be this as it may, had the rule of the family been as is alleged of old, the Appellant would never have exerted himself in its

deterioration or destruction, nor would he have put an end to it. In a word, the rule of the family has not been established in the manner which it ought to have been, and the *Wusseeyut-namah* of the defunct *Fookur-ood-deen Hossein* is not to be believed or upheld, for two reasons: the one is, that after the lapse of so long a period, to uphold and put in force, especially after the Appellant has acted in contrariety to its terms, is impracticable, and is repugnant to justice; the second is, that the *Wusseeyut-namah* does not indicate distinctly the name of which of his two sons shall be in entry and possession of the *Raj* and *Zemindary*, and shall succeed to it after his demise, while both the deceased *Akbar Hossein* and *Deedar Hossein*, who is living, are the sons of the late *Fookur-ood-deen Hossein*. If it be taken, upon the allegation of the Appellant, that the *Zemindary* should have devolved to the elder son, in that case it behoved the Appellant to pay into the Court's Treasury all the surplus amount which he had, as his share, improperly received, against the wish and desire of his father, which might have been left beyond what was necessary for his food and raiment from the period of the death of his father to the time of the demise of *Akbar Hossein*, and he should then have instituted an action, praying that the rule of his family might be maintained; and had in that case his ground been proved, he would have had a Decree for the whole of the *Zemindary*, and to the heirs of *Akbar Hossein* would have been awarded the sum in question with interest. At all events the *Wusseeyut-namah* cannot be credited by the Adawlut: even had it been credited, it would have been the cause of the destruction of the rights of others who have right and title; and although the *Ikrar-namah*

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may be credited, yet as mention in it is made of the rule of the family, which is in opposition to the Regulations in force, it is deemed illegal, and is not worthy credence. Besides, had Appellant apprehended that had there been only one male of the family, such person alone would be the proprietor of the whole of the *Zemindary* under the family rule, where, in that case, was the necessity for the Appellant to bustle about the falsity and forgery of the *Hibba-namah* and bill of sale, which were exhibited by the Respondent? He, besides, made no mention of it in his petition to the collector of *Zillah Purneah*, of the 17th *September* 1813, but has only stated that it is not the rule to grant away by gift the *Zemindary* in consideration of the amount of a marriage-settlement: and had, according to the Appellant's supposition, the rule of the family been maintained and in force, upon what ground of claim could he have instituted an action under the Mahomedan law for one half of the goods, &c.? And that he did bring a suit is clear and manifest from a copy of his petition of plaint; nor is it to be found in the rejoinder, put in by the late *Akbar Hossein*, that he admitted the rule of the family: so much he has asserted, that under the rule of the family, the *Zemindary* cannot be divided on account of a marriage-settlement. This point, however, is not under the Court's consideration now, because, before now, this objection and some other documents put in by the parties, were deemed false by a Court of four Judges. The case which now remains to be considered is, that as the documents which the parties exhibited have turned out to be false, to what person is the portion of the *Zemindary* which was in the possession of, and now left by, the defunct *Akbar Hossein*, to devolve?

It therefore appears to the Court necessary, meet and proper to divide the property left by *Akbar Hossein* among his heirs, agreeably to the book of God, (*Kitab-oollah,*) and that this decision be issued, made according to divisions agreeably to the *Furraiz* after the lawyers of this Court shall have stated the heirs in succession, according to the book treating of *Furraiz.* Also, that the former decision of this Court, bearing date the 4th of *August* 1826, be altered and amended for the reasons given above. It is therefore ordered, that the papers of the case be laid before another Judge, in order that he may determine, or otherwise, upon the alteration and amendment of the former decision given in this Court."

The cause then came on before *Samuel Thomas Goad,* Esq., on the 22nd of *January* 1822, and his opinion agreeing with that of the then Chief Judge, it was ordered that the papers be laid before the Officiating Judge for the purpose of a final Order being pronounced.

The cause was accordingly heard before the Officiating Judge, *William Dorin,* Esq.; and in the course of the proceedings before this Judge, it appeared for the first time that the Appellant and Respondent were *Sheeahs.**

On the 7th of *May* 1822, the Officiating Judge, *William Dorin,* Esq., pronounced his Judgment; the material part of which was as follows: "Notwithstanding in old times, the rule might have been, that the *Zemindary* shall devolve to one only of the male heirs, (in short it is from the circumstance of the *Zemindary* remaining entire to the period of the demise of *Fookur-ood-deen Hossein,* the Plaintiff's father, to

* The sect of Mahomedans who believe Ali to have been the rightful successor of Mahomet.

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be presumed that such rule did exist,) yet it is manifest that the rule has been superseded and rendered extinct by the act of the two brothers themselves, that is to say, of the Plaintiff and his brother the defunct *Akbar Hossein*; seeing, after the dissolution of *Fookur-ood-deen Hossein*, both the brothers became joint heirs to the estate in the *Moolky* year 1200; and even from the period they came of age, which was about the year 1208, up to the time of the death of *Akbar Hossein*, embracing a period of twelve years, they held joint entry and possession of the property as heirs, and received the profits of the *Zemindary*. Hence it is not very necessary to deliberate, whether keeping in sight the rule of the family, the non-division of the *Zemindary* can be upheld, notwithstanding that the *Shurá* declares that it shall be divided according to the *Furraiz*. The intent and meaning of Regulation XI. of 1793 is, that *Zemindaries* shall be divided according to the Mahomedan law and the *Sastras*, subsequent to the period of the enactment of that Regulation; and that any rule, by which a *Zemindary* was not liable to be divided, should be done away. But in some cases, in which Hindoos were parties, and which came before the Court under the contention, as to who was entitled to succeed to a *Zemindary* or to a *Rajship*, as it was ruled, that while a family rule existed, the provisions of the Regulation in question did not warrant a division of such *Zemindary* and *Raj* among the heirs; on the other hand, it countenanced it; and it was determined, that the non-division of such a *Zemindary* which belonged to a Hindoo, was not repugnant to the provisions of Regulation XI. of 1793; but no such a case has come before the Court, in which the parties were Mahomedans. It is presumable

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also that there is no provision of the *Shura* which upholds the non-division of a *Zemindary*. In fact the *Vakeels* of the Appellant themselves admit the assumption to be correct; on which account it appears to the sitting Judge, that one half of the *Zemindary* of *Pergunnah Soorjapore* is property which has been left by the deceased *Akbar Hossein*; and although the claim of the Plaintiff to a right and title to the entire *Zemindary*, under the rule of the family, has turned out to be false, yet he had a right to that portion which may be his according to the *Furraiz*; but as both the litigating parties are *Sheeahs*, nor do the Appellant's *Vakeels* deny that according to the *Shura* a brother of a deceased person cannot succeed to any portion of the property of a *Sheeah*, existing daughters of the said deceased, which fact is established by a *Futwa* (law opinion) filed by the law-officers of the Sudder Dewanny Adawlut in cause, *Wujihon Nissa Khanum* v. *Mirza Husun Ali*;* therefore, as the Plaintiff is not entitled to any portion of the property left by his late brother *Akbar Hossein*, by virtue of being heir to him, his claim should be dismissed *in toto*; and as the opinion of the presiding Judge is what has been set forth above, it is therefore ordered that the cause with this *Rubakary* (proceeding) be laid before the chief and the third Judges, who have given their voices regarding the admission of a review of judgment, so that a final order may be passed upon it."

On the 17th of *July* 1823, the Appellant presented a petition in the cause, representing that *Futwas*, (law opinions,) according to the *Imameea* tenets, (tenets of the *Sheeahs*,) were not in use, and praying that it might be ascertained how far those tenets were adopted.

* 1 Macnaghten, Sud. Dew. Rep. 266.

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By this petition it was admitted, that both the Appellant and the Respondents were *Sheeahs*; the petition was answered by a counter-petition of the Respondent, stating, amongst other things, that the Regulations in force enacted that disputes, especially respecting the title to inherit property, should be decided according to the religious persuasions of the litigating parties.

On the 12th of *August* 1822, the following judgment was given by the Court in the cause, and on the petition: "It appears that upon former occasions, when the case came on before, and was decided by the chief and by the third Judges of this Court, the Appellant's tenets had not come to light, in consequence of which it was deemed fit and good to divide the effects left by the *Rajah Akbar Hossein* amongst his heirs, according to the *Furroiz*. It has now been ascertained and clearly established, by the proceeding holden by the Officiating Judge on the 7th of *May*, and by the petition preferred by the Appellant on the 17th of *July* of the current year, that the Appellant with his *Vakeels* avow, that the Appellant is a *Sheeah*, and by the law opinion given by the law-officers of this Court, in the cause *Wujih-on Nissa Khanum* v. *Mirza Husun Ali*, it is clear, that agreeably to *Imameea* tenets, a brother of a deceased person has not right and title as an heir, to the property left by the deceased, existing the daughters of the defunct; on which account it does not appear to the chief and to the third Judge of the Sudder Dewanny Adawlut, that the Appellant has any right and title to inherit the *Zemindary* left by the deceased *Rajah Akbar Hossein*, and that therefore his claim should be dismissed: and the decision of the Provincial Court, dated the 27th of *August* 1817, in so far as regards the dismissal of Appellant's, (then Plaintiff's)

claim, should be affirmed. It is for this reason finally ordered and decreed by the concurrent voice of all the three Judges, that the claim and the appeal of the Appellant be dismissed; and that the decision of the Provincial Court, of the date aforesaid, be affirmed. Also that the judgment pronounced by the Sudder Dewanny Adawlut, on the 4th of *August* 1820, be reversed and annulled; and that when this Decree shall be carried into execution, the Appellant shall be made answerable to the Respondent for the *Wasilaut* of the period during which he, the Appellant, was in possession of the disputed *Zemindary*, under the Decree of the Sudder Dewanny Adawlut of the aforesaid date; and that the commercial note for the sum of 5,000 rupees, which the Respondent put in on the 30th of *December* 1820, in lieu of the necessary security-bond for her appeal to *England*, be returned to the Respondent's *Vakeels*, after taking a receipt for the same from the Respondent; and that the Appellant be rendered liable to pay the whole of the costs of the decision formerly given, and of the present one-fourth only, including the *Vakeels*' fees. As to the fees of the extra *Vakeels* for the Respondent, namely, of *Moulavie Miamut Ali* and *Moonshi Mujud Ali*, which have been deposited in the Treasury of the Court, they shall be paid by the Respondent to the said *Vakeels*.

"Upon a consideration of the subject of the petition which the Appellant presented on the 17th *July* of the current year, and its answer on the part of the Respondent, filed on the 6th of *August* of the current year, it is further ordered that the petition of the Appellant preferred on the date aforesaid is inadmissible."

The Appellant applied for and obtained leave to appeal from the whole of this Decree on the usual

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terms, and forwarded a transcript of the proceedings to *England*, but being ignorant of the form of proceeding in this country, took no further steps in the appeal until the year 1832, when he entered into an agreement with a firm at *Calcutta*, for the appointment of an agent in this country for the purpose of prosecuting the appeal. The agent to the *Calcutta* house in *England* having, however, become insolvent, nothing was done on the part of the Appellant in the matter of his appeal, which was in consequence, on the application of the Respondent in 1833, dismissed by an order of the Privy Council for want of prosecution.

The Appellant having presented a petition stating these circumstances, and praying that the appeal might be restored, accompanied by an affidavit verifying the facts of the petition, and offering to prosecute the appeal without further delay, the same was, on the 20th of *February* 1836,* ordered accordingly, upon the terms of the Appellant's paying the costs of dismissal, and of the order for its restoration.

The Appellant prayed the reversal of the judgment of the Sudder Court, of the 12th of *August* 1822, for the following reasons:

I. Because the *Pergunnah Soorjapore* constituted an indivisible *Zemindary*, to which the Appellant became entitled on the death of his brother *Akbar Hossein*; and because, as the ancestor of the Appellant died before the Regulation XI. of 1793 came into operation, and as that Regulation was repealed before *Akbar Hossein* died, the descent of the *Zemindary* could in no respect be affected by that Regulation.

* Present: Members of the *Judicial Committee*,—Lord Wynford, Mr. Baron Parke, Mr. Justice Bosanquet, and the Chief Judge of the Court of Bankruptcy.

II. Because, if the rule of descent had not precluded a division of the *Zemindary*, no division thereof between the brothers was ever made, and, consequently, the Appellant, on the death of *Akbar Hossein*, became entitled to the whole *Pergunnah*.

III. Because, there having been no division of the *Zemindary* between the brothers, *Akbar Hossein* possessed no interest therein capable of alienation; and because, if he had possessed such an interest, the alleged bill of sale, purporting to alienate it, was not, in fact, executed by, or with the sanction of, *Akbar Hossein*.

IV. Because, according to the custom of the family, the Respondent and her daughters, being females, are excluded from the inheritance, and are only entitled to a maintenance to be paid to them by the Appellant.

V. Because, under the terms of the *Wusseeyut* of the 25th of *January* 1793, and the *Ikrar-namah* of the 26th of *September* 1810, the Appellant, on the death of his brother *Akbar Hossein*, became entitled to the whole *Zemindary* of *Pergunnah Soorjapore*.

VI. Because the tenets of the *Imameea* sect of Mahomedans have never obtained in *India*, and ought not to govern the decision in this case.

VII. Because the ground upon which the Decree of the Sudder Adawlut ultimately proceeded was never insisted upon by the Respondent, or even suggested in that Court or the Court below, until the last review of the judgment, and was therefore a surprise upon the Appellant; and because, supposing the Decree to be otherwise right, it is erroneous and unjust, in the direction it contains with respect to the costs of this suit.

The Respondent, on the other hand, relied upon the following reasons:

I. Because it clearly appeared that the Will and

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Ikrar-namah set up by the Appellant were forgeries; and the rule of the family alleged by the Appellant, if it ever existed, (but which it was submitted on the part of the Respondent was not proved,) was superseded and put an end to by the acts and proceedings of the Appellant and *Rajah Akbar Hossein*, after they attained twenty-one; and, moreover, was contrary to the Mahomedan law, and defeated by the *Bengal* Regulation XI. of 1793.

II. Because the Appellant's claim, as heir of *Rajah Akbar Hossein*, was not in issue in the cause; and such claim, if proper to be entertained by the Court, was not well founded, the rights of litigating parties being, under the *Bengal* Regulation (Regulation IV., 1793, sec. xv.,) determinable according to the laws prevailing among persons of the religious persuasions to which such parties belong, and the Appellant not being the heir of *Rajah Akbar Hossein*, according to the law in force among the *Sheeahs*, to which sect both the Appellant and Respondent belonged.

Mr. *Pemberton*, Q.C., Mr. *Miller*, Q.C., and Mr. *Jackson*, for the Appellant,

Referred to Regulation XI. of 1793, Regulation X. of 1800, and Regulation II. of 1825, and cited *Ghirdharee Sing* v. *Koolahul Sing*,* and on the application of the *Sheeah* laws referred to the 10th vol. of the Asiatic Researches, p. 12 & 480, and to Macnaghten's Principles of the Mahomedan Law, p. 11.

Mr. *Wigram*, Q.C., and Mr. *G. Turner*, Q.C., for the Respondent,

Referred to section xv., Regulation IV., of 1793, and

* 2 Moore's Indian Cases, p. 344.

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Regulation XXVI. of 1814, and commented on the Regulations referred to by the Appellant, and cited *Wujih-on Nissa Khanum* v. *Mirza Husun Ali*,* *Omduton Nissa Begum* v. *Mirza Asud Ali*,† *Sumrun Singh* v. *Khedun Singh*,‡ *Rutch Dutt Putty* v. *Rajunder Narain Rae*.§

Mr. Baron PARKE:

14 Dec. 1841.

Their Lordships have now to pronounce their opinion upon an appeal from a final Decree upon a review, of the Sudder Dewanny Adawlut of *Bengal*, pronounced on the 12th *August* 1822. The case was argued before us on three days. We have fully considered it, and are prepared to advise Her Majesty to affirm that Decree.

The suit was instituted in *January* 1815 for the recovery of the moiety of the *Zemindary* of *Pergunnah Soorjapore*, to which the Appellant claimed to be entitled on the death of his brother *Akbar*, who died 28th *September* 1813, leaving the Respondent his widow and three children. This *Zemindary* had formerly belonged to the Appellant's father, *Fookur-ooddeen Hossein*, who died in the possession of it in *December* 1793. After his death this Appellant and his brother, then minors, were in joint possession of the *Zemindary*, and so continued after their majority in 1799 or 1800 until the demise of *Akbar*.

The Respondent was put into possession by the collector after some proceedings instituted by the Appellant to prevent it; and the Appellant was put to commence his action, which he did in the Provincial Court of *Moorshedabad* in *January* 1814.

* 1 Macnaghten's Sud. Dew. Rep. 266. † Ib. 276.

‡ 2 Macnaghten's Sud. Dew. Rep. 116.

§ 2 Moore's Indian Cases, p. 132.

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The Appellant rested his claim in that action upon three grounds:—first, a *Wusseeyut*, or Will of the late *Rajah* his father, alleged to have been executed by him on the 25th *January* 1793, by which he directed that one of his sons (not naming which) should take the whole *Zemindary*, and on his death that it should devolve on the survivor; secondly, an *Ikrar-namah* between the Appellant and his brother stated to have been executed by both on the 26th of *September* 1810, by which, after referring to the *Wusseeyut-namah* and the alleged rule of the family, that the *Zemindary* should be undivided, they agreed to hold it during their joint lives without division, and on the death of one the survivor to take the whole; and thirdly, the Appellant insisted that, by the family rule, the *Zemindary* was indivisible, and ought to belong to him to the exclusion of his brother's other heirs.

The Respondent, besides denying the Appellant's right, claimed under a deed of gift alleged to have been executed by *Akbar* a short time before his death, and to be in consideration of his marriage-settlement, and under another to his three daughters. These deeds the Appellant contended were forged.

Much evidence was gone into on both sides, and several decisions were made by the native Courts. On the 27th *August* 1817, the Judge of the Provincial Court decreed against the Plaintiff, being of opinion that the Respondent had proved the validity of the deeds of gift. In *February* 1820, there was an appeal to the Sudder; one of the Judges, Mr. *Goad*, was of opinion that the Respondent had not proved the deeds of gift under which she claimed, but that the documents of the Appellant were fabricated, and the family rule not proved, and he thought that the Decree should be reversed, and that it should be referred to the

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Mahomedan law-officers to ascertain into how many *Salems* or shares the *Zemindary* ought to be divided, and to whom they should be allotted, according to the *Furraiz* or law of succession. The case was then referred to Mr. *Courtney Smith*, who thought that the alleged family rule was made out, and the Appellant entitled to recover on that ground, being of opinion that the documents, the Will, and the *Ikrar-namah*, were not proved, nor the deeds of gift.

There being this difference of opinion, Sir *James Colebrooke*, another Judge of the Sudder, gave his decision upon the case. He concurred with Mr. *Smith* as to the invalidity of the deeds of gift, and he intimated a strong suspicion of the *Wusseeyut*, though he thought the *Ikrar-namah* genuine, and he also considered that the family rule was made out.

There was then a petition for a review, which was granted. On that review, Mr. *Leycester*, the Chief Judge, was of opinion that the family rule was not proved; that if it was, the Regulation of 1793 abrogated it; that the *Wusseeyut* was not established, and the *Ikrar-namah* void if that document was genuine, and the deed of gift he thought was fabricated. His decision therefore was, that the property must be divided according to the *Furraiz*.

Mr. *Dorin*, the officiating Judge, thought the *Wusseeyut* a forgery, the *Ikrar-namah* not proved, and the deed of gift invalid; and that though the *Zemindary* might have been formerly subject to a rule that it should be undivided, the two brothers had done away with that rule: and since the Regulations of 1793 it was divisible according to the *Furraiz*, and both the litigating parties being of the *Sheeah* sect, according to whose rules of succession a brother cannot inherit to a

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brother having daughters, he gave his decision against the Appellant's claim altogether.

The Appellant presented a petition, objecting that the *Sheeah* rules of succession have never been adopted by the Courts of *Hindostan*; which, with a counter-petition, were considered by all the Judges, and finally, on the 12th of *August* 1822, the three Judges concurred, that the Appellant's claim should be dismissed; that he should be answerable for the *Wasilaut* (collections or profit) of the period during which the Appellant was in possession; that he should pay the whole costs of the former decision, and one-fourth of that. The appeal is from that decision.

Their Lordships feel no difficulty in concurring with the great majority of the Judges in the opinion that the deeds of gift, under which the Respondent claims, are fabricated, and that the *Wusseeyut* and *Ikrar-namah* are open to so much suspicion, that the claim of the Appellant, so far as it is founded upon or confirmed by them, must fail. The absence of the original *Wusseeyut* from the place where it ought to have been if it had been a genuine instrument, its non-production, the conflicting accounts given of its contents, and the failure of the Appellant to bring it forward at an earlier period, and particularly in opposing registration of the Respondent's deed before the collector, when it would at all events have prevented that officer from letting the Respondent into possession,—leave little doubt in the minds of their Lordships that the instrument was never executed by the deceased *Rajah*, now that the evidence is insufficient to support it. If the *Wusseeyut* was forged, the *Ikrar-namah*, which recites it, must have been forged also. But without going so far, it is enough to say that the nature of the evidence in sup-

port of it, and the conduct of the Appellant in not producing this instrument before the collector, leave their Lordships in so much uncertainty as to its authenticity, that they consider that they ought not to attach any weight to it as supporting the Appellant's claim.

Two grounds therefore on which the Appellant has rested his claim having failed, it now becomes necessary to dispose of the third, that principally insisted upon in the argument before us, viz., the supposed family custom that the *Zemindary* had never been separated, but devolved entire on every succession, and that such custom was still in force.

If the existence of the custom in point of fact, at the death of the father, was the question to be determined by their Lordships, they would have entertained some doubt upon it; for the circumstance that the *Zemindary* had been held entire for a very long period would seem to indicate that the ordinary rules of succession had not been applied to it, and gives great countenance to the supposition that such a custom existed. But supposing that were so, their Lordships are clearly of opinion that the family usage cannot exempt this *Zemindary* from the operations of the Regulation XI. of 1793; that Regulation provides, that after the 1st of *July* 1794, if any *Zemindar* shall die without a Will, &c., and leave two or more heirs, who by the Mahomedan or Hindoo law, (according as the parties may be of the former or latter persuasion,) may be respectively entitled to succeed to a portion, such heirs shall succeed. This being a claim to succeed to *Akbar*, who died long after *July* 1794, not to *Rajah Fookur-ood-deen*, who died before, the succession must be governed by this Regulation. The proviso, sec. v., did

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not affect this case, for that was introduced to avoid any retrospective operation of the previous clause, and to prevent any claim by the co-heirs under it, to succeed to an estate which had then devolved entire or should devolve entire before the 1st of *July* 1794.

It was, however, contended on the part of the Appellant, that the Regulation of 1793 was repealed, with respect to this *Zemindary*, by another Regulation made on the 1st of *December* 1800, Regulation X., which, referring to the prior Regulation of 1793, recites that a custom having been found to prevail in the *Jungle Mahals* of *Midnapore*, and other districts, by which the succession to landed estates invariably devolved to a single heir without the division of the property, and the custom having been long established and founded on certain circumstances of local convenience which still exist, the Governor-General enacts that the Regulation of 1793 shall not supersede or affect any such established usage which may have obtained in the *Jungle Mahals* of *Midnapore* or other districts, and that in the *Mahals* in question, the local custom of the country shall be guided by it in the decision of all claims which may come before them in the inheritance of landed property situated in those *Mahals*. But it is clear to their Lordships, that this Regulation did not apply to undivided *Zemindaries*, in which a custom might prevail that the inheritance should be indivisible, but only to the *Jungle Mahals*, and other entire districts, where local custom prevails.

The construction contended for, viz., that every individual *Zemindary* in which the custom had been that it should descend entire was exempted, would repeal the Regulation of 1793 altogether; whereas it is clear that it was intended to be partially repealed only.

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Their Lordships, therefore, have arrived at the conclusion, that on the death of *Akbar*, his interest in the *Zemindary* devolved, according to the Mahomedan law of succession, to several heirs.

The only remaining question is, whether the law of succession is to be that which prevails amongst the *Soonees* or *Sheeahs*, the rule as to each sect being different, and both the litigant parties belonging to the latter. If the law of the *Sheeah* sect is to prevail, the Plaintiff has no title, as a brother cannot succeed.

By Regulation IV. of 1793, sec. xv., it is provided, "that in suits regarding succession, inheritance, marriage and caste, and all religious usages and institutions, Mahomedan laws with respect to Mahomedans, and Hindoo laws with regard to Hindoos, are to be considered as the general rules by which Judges are to form their decisions." According to the true construction of this Regulation, in the absence of any judicial decisions or established practice limiting or controlling its meaning, the Mahomedan law of succession applicable to each sect ought to prevail as to litigants of that sect. It is not said that one uniform law should be adopted in all cases affecting Mahomedans, but that the Mahomedan law, whatever it is, shall be adopted. If each sect has its own rule according to the Mahomedan law, that rule should be followed with respect to litigants of that sect. Such is the natural construction of this Regulation, and it accords with the just and equitable principle upon which it was founded, and gives effect to the usages of each religion, which it was evidently its object to preserve unchanged; we feel no doubt, therefore, that we ought to interpret the Regulation of 1793, to adopt the usage or law of each sect, unless there be

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a course of judicial decision or established practice to the contrary.

As to judicial decision there is none: and the only precedent bearing upon this question is in favour of the application of the *Sheeah* law. It is the case of *Wujih-on Nissa Khanum* v. *Mirza Husun Ali*, (1 Macnaghten, 266,) in which it was proposed by the Court as a question to the Mahomedan law-officers, what would be the distribution according to the law of either sect; and their direction implies, that the *Soonee* law was not the established rule of decision in all cases in our Courts of Justice. As to the practice, we have availed ourselves of the means of consulting several gentlemen of great experience in the administration of justice in the Indian Courts, and we cannot find that there is any course of practice with respect to all Mahomedan successions at variance with this construction. It is true that the *Soonee* law has generally prevailed, because the great majority of the Indian Mahomedans are *Soonees*, there being very few families of the *Sheeah* sect, except those of the reigning princes, which will account for the prevalence of the *Soonee* doctrines in the Courts, but there is no practice which excludes the application of the *Sheeah* law to the rights of persons professing the tenets of that sect. The natural and equitable construction of the Regulations must therefore prevail.

For these reasons, the advice which their Lordships will give to Her Majesty is, that the Judgment of the Sudder Dewanny Adawlut must be affirmed; and their Lordships do not think it right to make any alteration in that part of the Decree which relates to costs. That part, however, which directs the Appellant to account to the Defendant for the proceeds of the

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moiety of the *Zemindary*, whilst he was in possession, must be altered. He must bring the amount in Court to be paid to those who are heirs according to the *Sheeah* law of succession and of their representatives, and the Decree of the Court below, with that modification, is to be affirmed with costs.

BABUN WULLAD RAJA KATIK - - *Appellant*,

v.

DAVOOD WULLAD NUNNOO - - *Respondent*.*

On Appeal from the Sudder Dewanny Adawlut of Bombay.

23rd & 24th Feb. 1841.

Claim to the hereditary office of the headship of the butchers, in the town of *Ahmednuggur*, dismissed, no satisfactory proof being shown of the right to inherit, and adverse possession of the office being had for more than thirty years.

THIS was an appeal arising in a suit instituted by the Appellant against the Respondent, to recover from him the hereditary office of the headship of the butchers, in the town of *Ahmednuggur*, in the suburb of *Baranuggur*, together with 251 rupees damages by way of compensation for the profits of the office.

The office, which was of very ancient origin, was formerly held by one *Motee*, who was represented as ancestor of both parties.

It was admitted, that ever since the year 1800, the office had been possessed by the Respondent, and his father, *Nunnoo Wullad Sultan*, it having been then granted or confirmed by *Scindia*.

* Present : Members of the *Judicial Committee*,—Lord Brougham, Lord Denman, Mr. Baron Parke, Mr. Justice Bosanquet, and the Right Honourable Dr. Lushington.

Privy Councillor—*Assessor*, Sir Edward Hyde East, Bart.

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The plaint was filed by the Appellant, on the 19th of *August* 1826, in the Zillah Court of *Ahmednuggur*, before the Junior Assistant Judge. It alleged that the right to the *Mehtari* or headship of the butchers in the city of *Ahmednuggur* was the Appellant's, and had descended to him from his progenitors; and that the papers and ancient documents containing the proofs of his right of headship fell into the hands of the deceased *Nunnoo*, in the time of *Scindia's* Government, about twenty-five years previous, since which time the headship had been unjustly exercised by him.

The Respondent, by his answer, denied the right of the Appellant, and alleged that ever since the *Jaglee* era 1069, A.D. 1661, his elders had possessed a *Sunnud** in their name, and had enjoyed this privilege; that some time since, his ancestor had left the place, and during his absence, this headship was held by other persons, and the Plaintiff had no interest or control in it. That in the year *Jaglee* 1137 (A.D. 1729-30,) the *Settees*, and *Mohajun*, and others, hereditary officers of the city, sent a summons to his ancestor, and that his ancestor appeared before the *Sircar*, (the head of the affairs of the Government,) and received from *Scindia's* authorities, after showing them the *Sunnuds* and documents, and the summons (*Kowl*) and other papers, a confirmation of his right to exercise the privilege of the headship, and that to this proceeding, no one made any objection. That the Plaintiff, in the year *Saka* 1740, (A. D. 1818-19,) fraudulently and falsely made a complaint to the caste, and stated therein, that in respect to the headship, he was brother to him, the Defendant; and having gone from village to village, and assembled some of the caste, drew up a false

* Title-deed in the nature of a grant.

opinion at the village of *Bingar*, at which time and place the father of the Plaintiff (since deceased) brought forward a fabricated document; upon which proceeding he subsequently made a complaint before Mr. *Hockley*, the then Judge of the *Zillah* of *Ahmednuggur*, and produced papers, a *Sunnud*, and the before-mentioned fabricated document. That the father of the Plaintiff was then distinctly told, that there was no cause for a suit for the headship against his opponent. That after this, the Plaintiff made a complaint in the *Moonsiff's** Court against his, the Defendant's, aunt, on which there was assembled a *Punchayet*, and a decision was come to, and the documents, *Sunnuds*, letters and *Kowl*, together with the pleadings of the Plaintiff and Defendant, having been duly recorded, were submitted to the *Moonsiff's* Court, and the *Moonsiff* passed a Decree in his, the Defendant's, favour.

The Appellant, by his reply, did not deny that the Respondent was possessed of the *Sunnud* of office and other documents relative thereto, but insisted that the Respondent's father, *Nunnoo*, had obtained them fraudulently. After the Respondent's rejoinder, and some of the documentary evidence, had been taken, an order of reference was made by the Junior Assistant Judge, referring it to the *Moonsiff* of the Court to investigate the Appellant's claim, and to report who was legally entitled to the *Mehta* (office).

Oral and documentary evidence was entered into before the *Moonsiff* on the part of the Plaintiff, who also filed a genealogical table to show his descent from *Motee*, the original holder of the office, and examined

* Native Judge or Commissioner, exercising a limited jurisdiction in civil suits.

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witnesses to prove his pedigree, but it appeared from some of the Appellant's own witnesses, that neither the Appellant nor any of his ancestors had been in the actual enjoyment of the office for a period of more than thirty years.

The Respondent did not examine any witnesses before the *Moonsiff*. The documentary evidence he adduced consisted, among other things, of a Government order of ancient date, for exempting from certain duties and taxes, one *Motee*, described therein as the head of the butchers, and from whom the Respondent claimed descent; another document was a formal relinquishment of title to the office made by the Appellant's father (under whom the Appellant claimed), in favour of the father of the Respondent; the Respondent also filed the Decree of the Zillah Court of *Ahmednuggur*, dated the 1st of *March* 1826, which had been pronounced in the previous suit brought by the Appellant, as before-mentioned, and on which the Respondent insisted in his answer.

On the 3rd of *June* 1828, the *Moonsiff* made his report, whereby he declared, that the Appellant had proved his claim to the office, with its rights and privileges, and was entitled to the possession thereof; and on the 6th of *June* 1829, the Junior Assistant Judge of that Court simply adopted the *Moonsiff's* report, and made his Decree in favour of the Appellant, the Plaintiff in the suit. From this Decree the present Respondent appealed to the Senior Assistant Judge, and on the 20th of *October* 1828, the following order was made on the appeal, viz., that the Junior Assistant Judge had sent this case to the *Moulavie** for in-

* The title of a learned Mahomedan lawyer—a referee.

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vestigation, without the consent of both parties, and that the depositions of the witnesses were taken in his presence, and not in that of the Junior Assistant Judge, to whom he sent his report, and upon which the decision was passed; the Court observed, that "as it was not in accordance with the Regulations for the *Moulavie* to take down the depositions of the witnesses in his presence, the appeal was dismissed, and the original suit returned to the Junior Assistant Judge for trial, that he might, by examining witnesses in his presence, and by taking into consideration the documents produced by both parties, enter into a strict investigation of the case, and pass a fresh decision, with which if either party should be dissatisfied they shall be at liberty to appeal against it."

In consequence of this order, some of Plaintiff's witnesses were re-examined before the Junior Assistant Judge, and the case was reheard before him.

The Junior Assistant Judge ultimately made a Decree, dated the 13th of *February* 1829, in favour of the Appellant. From this Decree, the Respondent, on the 13th of *March* 1829, appealed to the Senior Assistant Judge. The Senior Assistant Judge having examined both the parties personally, made his Decree, on the 30th of *April* 1829, whereby he reversed the Decree of the Junior Assistant Judge of the 13th of *February* 1829.

From this decision the present Appellant appealed to the Zillah Judge of *Ahmednuggur*, who on the 29th of *December* 1831 made his Decree, reversing the decision of the Senior Assistant Judge, of the 30th of *April* 1829, and affirming that of the Junior Assistant Judge, of the 13th of *February* 1829. From this last-mentioned Decree the Respondent appealed to the

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Sudder Dewanny Adawlut of *Bombay*, which Court, on the 13th of *June* 1834, made its Decree, whereby the Decree of the Zillah Judge, of the 29th of *December* 1831, was reversed, and the decision of the Senior Assistant Judge confirmed with costs.

From this Decree of the Sudder Dewanny Adawlut of *Bombay* the present Appellant appealed to His late Majesty in Council.

Mr. *Miller*, Q. C., Mr. *Wigram*, Q. C., and Mr. *Jackson*, for the Appellant,

Contended that the Appellant had proved a *primâ facie* title, by means of his genealogical table, from one *Babun*, the great grandson of *Motee*, the head of the butchers, from whom he, the Appellant, was the eldest surviving male descendant, and that the Respondent, who was descended from a younger branch, had wholly failed in establishing any title either in himself or his immediate ancestors to the office in question.

Mr. Serjeant *Spankie*, Mr. *E. J. Lloyd*, and Mr. *Edmund F. Moore*, for the Respondent,

Insisted, first, that the evidence of the Appellant was insufficient to establish his alleged title to the office; and, secondly, that as it appeared from the Appellant's own admission, as well as from the evidence, and the fact was, that he and his ancestors have been out of possession of the office for a period exceeding thirty years, his right of action was barred, and the Court precluded, by the *Bombay* Regulation of Limitation, (Reg. I. of 1800, s. xiii.) from investigating the question of title.

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Lord BROUGHAM:

Their Lordships are of opinion, that considering the evidence in this case, and the whole matters that have been argued before them on either side, that the Plaintiff below, the present Appellant, fails in making out even a *primâ facie* case. The evidence taken amounts really to no more than this, that the witnesses, with various degrees of accuracy and consistency, two or three of them, particularly the older ones, speaking to the exercise of this office, by *Babun*, calling himself the grandfather of the Plaintiff; which mode of speaking respecting *Babun*, and his relationship to the Plaintiff, is really the only proof that there is in the cause, of the right of the Plaintiff, the present Appellant. Admitting, therefore, the office to exist and to be hereditary, in which both parties seem to be agreed, there is no evidence whatever of any descent of the office in the family of the Appellant who now claims it. Taking the whole case, then, together, their Lordships are of opinion, that this is a ground upon which his claim ought to be rejected, and the decision of the Sudder Adawlut in the last instance affirmed; that decision reversed the previous one, which had reversed that before it, which again had reversed the original Decree; there were therefore two decisions on each side, and their Lordships are of opinion that this is a ground quite sufficient to support the decision of the Sudder Adawlut in the last instance.

Their Lordships do not think it necessary to take into consideration the question with respect to the period of possession of the office, except in so far as to observe that the length of time during which the

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office has been exercised by the Respondent and his father, will very much strengthen the observation that arises upon the defect of proof on the part of the Appellant. It is not necessary to consider such possession as a bar, but as going very much to strengthen the presumption against the case of the Appellant.

Their Lordships also do not think it necessary to say anything respecting the grant by *Scindia* to *Nunnoo*, through whom the Respondent might be supposed to claim. We have no evidence before us of the grant of *Scindia*, and no evidence of the grant appears to have been before the Courts below. If such a grant were made by that authority, it is quite unnecessary to say whether it would or would not have been a valid grant. In all probability it might have been valid, being a grant by the supreme power of the State, in whatever way the office might have been granted before in the family of *Babun*. But that is not before their Lordships; there is no evidence on the subject, and therefore this affirmance of the Decree of the Court below is wholly irrespective of, and does in no way proceed upon any grant by *Scindia*.

Their Lordships, therefore, are of opinion, that the decision of the Court in the last resort in *India* must be affirmed, but nothing said as to the costs of the appeal.

JUGGEEWUN-DAS KEEKA SHAH - - *Appellant,*

v.

RAMDAS BRIJBOOKUN-DAS - - - - *Respondent.**

On Appeal from the Sudder Dewanny Adawlut of Bombay.

25 & 26 Feb. 1841.

Mortgage of a village which was partnership property, made by some of the partners for the benefit of the firm, held binding on a member of the firm, though not executed by him.

In pursuance of a stipulation contained in a mortgage-deed, that the mortgagees should be at liberty to place a *Mehta* (or clerk) of their own to receive the collections, to be paid a weekly salary by the mortgagor, such officer was appointed, who received the collections for the first few years, and paid them over to the mortgagees, but afterwards discontinued such payments, and handed over the amount of the collections to the mortgagors. An attachment having issued against the estate at the suit of a late partner for the amount of his share of the property upon a dissolution of the partnership, held by the Judicial Committee (overruling the Judgment of the Sudder Court), that the appointment of a *Mehta* by the mortgagees was a possession by them only so long as he continued to pay the collections over to the account of their mortgage, and that the subsequent payment by him of the collections to the mortgagors did not create a forfeiture by the mortgagees; the effect of the power to appoint a *Mehta* being merely equivalent to the mortgagees' right to receive the rents and profits if they should think fit, and would not operate so as to postpone their security to the attachment subsequently obtained, unless they permitted the payments to be made to the mortgagors after notice of such attachment.

THIS was an appeal from a Decree of the Sudder Dewanny, reversing a previous Decree of the Zillah Court of *Surat*, in a suit brought by the Appellant, *Juggeewun-das Keeka Shah*, and another, against the present Respondent, for the purpose of procuring the removal of an attachment which had been issued by the Respondent against a village called *Muzeegaum*, in execution of a Decree obtained by him in a suit against the heirs of the shop or house of business of *Lal-kishen*, the proprietors of the village in question. The ground

* Present: Members of the *Judicial Committee*,—Lord Brougham, Mr. Baron Parke, Mr. Justice Erskine, and the Right Honourable Dr. Lushington.

Privy Councillor,—*Assessor*,—Sir Edward Hyde East, Bart.

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upon which the Plaintiffs in the suit sought the removal of the Respondent's attachment was, that the village, together with a house in *Surat*, were included in a previous mortgage executed in their favour by the heirs of *Lal-kishen*.

The Respondent had been a partner or shareholder in *Lal-kishen's* firm, and on the 24th of *December* 1822, a Decree was made by the Zillah Court of *Surat*, in a suit between him and the heirs of the shop of *Lal-kishen*, by which a sum of R. 19,025 was awarded to him in satisfaction of his share in the assets of the firm, and at the same time all the assets of the firm, including the village in question, were decreed to the heirs of *Lal-kishen*, as the continuing partners of the shop.

To satisfy the amount of this Decree, the Respondent applied to the Court to be put into possession of the village *Muzeegaum*, but the Appellant and his Co-plaintiff alleged that they were entitled to the premises, by virtue of a mortgage which they held.

Ultimately, an order was made for an attachment to issue against the village in favour of the Respondent, and it was for the removal of this attachment that the Appellant and his Co-plaintiff, on the 3rd of *September* 1825, filed their plaint in the Zillah Court of *Surat*, in which they set forth that the sum of R. 17,855. 0. 55. was the balance of principal and interest due to them by virtue of their mortgage-bond, which they described as having been given in the year 1234, *Hijra* 118-19, A.D. 1819, by *Shah Poorshotumdas*, *Lal-das*, *Juggeewun-das* and *Dulputram*, the heirs of *Lal-kishen*, to secure the payment of the sum of R. 18,251, upon the revenues of the village *Muzeegaum*, and a house at *Surat*.

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On the 27th of *September*, and before putting in his answer to the plaint, the Respondent presented a petition to the Court, in the suit in which he had obtained his Decree for the sum aforesaid, stating the circumstances under which the attachment had been awarded to him, and praying that the village might be given into his possession, but the Court declined making any order thereon pending the prosecution of the present suit. The Respondent shortly afterwards put in his answer to the plaint, in which he alleged, that the Plaintiffs in their mortgage-deed had retained the power of making the collections in the village; that the yearly produce of the village was R. 4,000, but that the Plaintiffs had written in their own mortgage-bond that the yearly amount was R. 3,200, so that, by their own account, R. 19,200 of their claim had been repaid. That the Plaintiffs might, perhaps, claim a small balance for interest, R. 6,000 or thereabouts, in part whereof they had in their possession a house, valued at R. 10,000. The Respondent insisted that the house should be sold for the purpose of satisfying what was due to the Plaintiffs, and offered to pay whatever balance, if any, should then remain due to them.

The Plaintiffs, by their reply, stated that the amount claimed by them was upon the footing of an account settled between them and the mortgagors, in which were entered all sums which the mortgagors had caused to be paid to them from the revenues of the village, and that the house was not worth more than R. 3,000.

The Respondent, by his rejoinder, charged that, inasmuch as the Plaintiffs, the mortgagees, had by their mortgage secured to them the whole of the produce of

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the village, they were liable to account for the whole; and that the Plaintiffs and the mortgagors were acting in collusion together, in representing the profits of the village to have been less than they were in fact, in order to defeat the right of the Respondent.

The cause being at issue, the parties entered into evidence.

The Plaintiffs produced the mortgage-bond, dated the 8th of *August* 1819, and which was in the following form :—

" The reason of writing is this, that we, *Poorshotum-*
" *das* the son of *Lal-das*, and *Lal-das* the son of
" *Kishen-das*, and *Juggeewun-das* and *Dulputram* the
" sons of *Nana-bhaee*, and *Nana-bhaee* the son of
" *Brijbookun-das*, and *Brijbookun-das* the son of
" *Kishen-das*, *Banians* of the *Dendoo* tribe, inhabitants
" of the fortunate sea-port town of *Surat*, in *Pendole-*
" *poll* (or street), do state truly in this matter, that
" for the purpose of liquidating the money due to the
" shop (or firm) of *Lal-kishen*, we having borrowed
" money in the name of *Juggeewun Hurjewun*, have
" liquidated the debts of the firm, and we do place in
" mortgage the waste and cultivated lands and fields,
" together with various trees and wells of water of
" the village of *Muzeegaum* in the *Pergunnah* of the
" *Chicklee*, now under the protection of *Surat Sirkar*.
" The ground has been surveyed, and the boundaries
" defined, and we are fully convinced that this property
" belongs to us and to our heirs, as part of the said
" firm, and for the purpose of liquidating the debts of
" the said firm it is appropriated; we have kept this
" property in our possession, it being our own, and
" no other person having any claim thereto. Also a
" *pucka* (substantial) built house at *Surat*, together

" with its ground and teakwood posts and beams of
" three stories of timber, and *pucka* built, part of the
" roof thereof being terraced and part covered with
" tiles, with one tank for water, and one well and a
" bathing-place; its four walls are built of burnt brick
" and mortar, its boundaries have been measured, and
" are specified below. This inheritance of ours did
" come to us from our ancestors, and this property
" has been in our possession and use up to the period
" of giving it in mortgage. So long as it was not
" mortgaged, it was in our possession, no other person
" has, more or less, any title or right thereto. This
" property of ours have we, for the sum of *Surat*
" R. 18,251, the half of which is 9,125. 2., of the
" *Surat* currency, in part of this money mortgaged
" into the hands of *Juggeewun-das*, the son of *Gunga-*
" *shah*, the son of *Rega-das*, a *Bukkall* by caste, and
" inhabitant of the *Shawl-mens poll* (or street), and to
" *Brijbookun-das*, the son of *Gokul-das*, the son of
" *Doolub-das*, by caste *Dressabpoora-banian*, inhabi-
" tant of *Bhagah Tullow*; and out of this money,
" R. 12,199, being the claim of the son of *Merwan-jee*
" *Ruston-jee Bukkariah*, in conformity to a Decree of
" the Adawlut Court, dated the 11th *March* 1818,
" A.D., in the case No. 436 of 1817, A.D., which he
" did demand against the said firm, and a receipt for
" the same is written on the back of the Decree;
" agreeably thereto, we caused the amount to be paid
" by those persons to whom we have mortgaged the
" premises, and R. 2,000, in part of the claim of
" *Juggeewun Gunga-shah*, settled by account and hand-
" writings given in the name of *Juggeewun Hurjeewun*,
" was paid him on account, and the balance of R.4,052

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" we have received in cash from the persons who take " this mortgage, and have taken possession of the " same, and such other petty claims as existed against " the shop we have paid off, and the entire sum accru- " ing from this mortgage, as per particular statement, " we have received from the holders of this mortgage. " The profit (or interest) of this money is settled for " at twelve anas on these conditions, that the holders " of the mortgage are to receive in redemption the " whole of the produce of the said village about " R. 3,000 or 3,200, and after allowing for interest, " the remainder will go for the purpose of liquidating " the principal, and they shall continue so to receive " and appropriate the annual produce until the whole " of their demand be liquidated; the risk of collect- " ing the income, and of any deficiency in the revenue, " is upon our heads, and we do further declare that " the holders of the said mortgage shall station a " *Mehta* (or clerk) of their own in the said village, for " the purpose of making the collections; and we, the " mortgagors, so long as this property remains in " mortgage, we do agree to give him a monthly salary " of five rupees, and his daily food, as long as we can " afford to do so. And about this house which is " mortgaged we (the mortgagors) have retained it in " our charge, but until your money is liquidated we " have no power over its disposal, and whenever the " mortgagees may demand or require their money, we " hold ourselves jointly and individually responsible " for the claim. With respect to the repairs, turning " of the tiles, and other matters about the house, " also keeping the wells, &c., of the village in " order, all this belongs to us to perform; should

" however any calamity (which may heaven avert) " from the heavens or the earth, from the *Grassias'** " claims, the sequestrations of the state, or from the " ravages of an enemy, or mishap of any other kind, " occur either to the house or the village now given, or " should any former proprietor, inheritor, shareholder, " or mortgagee, come forward and set up claims " thereto, then (for all such) we will be responsible; " and in part of the amount so claimed, we will make " satisfaction to the parties, either from our own funds, " or from other property, and without harm or damage " to the present securities, we will settle such demands; " the performance of this belongs to us; and we, " *Juggeewun-das* and *Brijbookun-das*, the holders of " the mortgage, do declare, regarding the village and " the house which have been written and given for the " money above stated, that they have so been received " from the mortgagors by advancing our own money " thereon, and we have received them in mortgage " agreeably to the forms and uses of the Mahomedan " law. And there is one *Sunnud* in Persian written on " the 20th of *February* 1818, relating to the cause No. " 458 of 1816, and another Decree in English of an " appeal, and another Decree of *Merwanjee's* above " mentioned; these three papers have been deposited " with the mortgagees, and whenever the amount for " which the property has been mortgaged shall be " liquidated, then they will be received back again by " the mortgagors."

* Persons hereditarily entitled to collect the revenue of certain lands in *Guznat*, and in some cases to receive money payments out of the revenue collected by others. The *Grassias'* rights were originally acquired as the price of forbearance from plunder, during the weakness of the native governments.

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Although the amount for which this mortgage was given was for advances made by the Plaintiffs for payment of debts of the firm of *Kishen-das*, at a time when the Respondent was a partner in the firm, yet the Respondent did not join in or execute the bond. He did not, however, dispute the original debt or the security, but he insisted that the Plaintiffs must be charged in the present suit with the amount of the revenues and profits of the village, which by the terms of the mortgage-bond they were to receive.

The Plaintiffs also put in accounts of what they had received on account of the profits of the village, and of what remained due to them for principal and interest on their mortgage, amounting to R. 17,855. 0. 50.

The present Respondent produced as documentary evidence, amongst other things, the Decree of *December* 1822, under which he was entitled against the continuing partners of the house of *Lal-kishen* to the aforesaid sum of R. 19,025, in satisfaction of his share of the assets, and for which the attachment in question in the suit had issued. The Respondent also filed a copy of a plaint brought by the Plaintiffs in the present suit against certain other persons, dated the 4th of *November* 1825, from the statements in which it appeared that the Plaintiffs were and had been in the possession of the village.

Witnesses were examined only by the Plaintiffs: it appeared from their evidence that the Plaintiffs had, according to the terms of the bond, stationed a person at the village to make the collections on their behalf, and that the collections from the village were in fact paid to or on account of the Plaintiffs.

The cause came on to be heard on the 2nd of *November* 1826, when the Zillah Court of *Surat*, after

noticing the circumstances of the case, and adverting to various particulars which tended to show that although the Respondent was not a party to the mortgage-bond, it was executed with his privity, observed as follows :—"The Defendant has stated in his answer "that the Plaintiffs had received the whole amount "for which the village was mortgaged; but to prove "the same, the Defendant has not produced any evi- "dence regarding the handwritings of the mortgagors, "which the Plaintiffs have put in evidence: it is not "necessary to make any remarks, therefore it is "decreed that the attachment placed by the Defendant "be removed. Regarding costs, it is ordered that the "Defendant pay on R. 10,000, and the rest of the costs "the Plaintiffs are to pay for. Although the village "of *Muzeegaum* and the house at *Surat* are mentioned "in the mortgage-bond, yet this action is brought to "remove the attachment from the village of *Muzeegaum* "only. It is not, however, specified in the mortgage- "bond that so much money was advanced upon the "village, and so much upon the house. The Defendant "states this house to be worth R. 10,000, but the "Plaintiffs assert it to be worth not more than R. "3,000: for this reason the Court has decreed that the "Defendant pay costs only on R. 10,000: it is thus "decided, and the cause determined."

The Respondent being dissatisfied with this Decree, appealed to the Sudder Dewanny Adawlut of *Bombay*. After the pleadings in appeal had been completed, further evidence was produced, and an account-current relative to the mortgage, and brought down to the period when the attachment issued, was drawn out by the order of the sitting Judge.

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The present Respondent also put in an account-current of the village from 1819-20 to 1827.

The appeal came on for hearing before the Sudder Dewanny Court on the 16th of *June* 1827, and on the 11th of *December* in the same year, the Court pronounced its Decree, wherein it stated, that " having " duly considered all the proceedings in this appeal, " the Court is of opinion, that the Respondents (the " present Appellant and his Co-plaintiff in the suit) " have used collusion with the proprietors of the village " of *Muzeegaum*, to the misappropriation of the income " of the village, which ought to have been applied, " according to the conditions of the engagement be- " tween them, to the liquidation of the sum secured " by the mortgage upon it, they, the Respondents, " (below,) having had the full and entire possession " and management of the property.

" It is therefore now decreed in conformity with the " Appellant's (the present Respondent's,) original ap- " plication to the Zillah Court, that the attachment " laid by him upon the village of *Muzeegaum* be held " in force, by putting the Appellant in possession of " the village, and of the management of its concerns; " that the Appellant do further render a true and " faithful account annually to the Zillah Court of " *Surat*, of all profits, rents, and issues received by " him from the said village of *Muzeegaum*, together " with an account of all fair and reasonable expenses " incurred in the management of it. And that the " said Appellant do continue in such possession of the " said village until the sum adjudged to him by the " Zillah Court of *Surat* by its Decree, dated the 24th " of *December* 1822, with simple interest thereon, and " as therein provided for, be fully paid and satisfied;

" the operation of the Decree to have effect from the " current *Fusal* (*Sumvit* 1884): the possession of the " village of *Muzeegaum* will then revert to the Re- " spondents (below). The Decree of the Zillah Judge " of *Surat*, dated 2nd of *November* 1826, is accordingly " reversed; full costs to be paid by the Respondent."

Against this Decree, the present Appellant *Juggeewun-das Keeka Shah*, after petitioning for a re-hearing, which was refused, appealed to His late Majesty in Council; praying that the Decree of the Sudder Dewanny Adawlut might be reversed, altered, or varied, for the following reasons:—

I. Because (in the view of the case most favourable to the Respondent) the village of *Muzeegaum* was partnership property, and being so, was well charged with payment of the sum secured by the deed of the 8th of *August* 1819.

II. Because it appears, from the accounts in evidence, that the sum of R. 17,855 was due to the Appellant and *Brijbookun-das Gokul-das*, his co-Plaintiff, at the time of the institution of this suit, and there was no evidence impeaching the accuracy of these accounts.

III. Because if the continued perception of the profits of the village by the firm of *Lal-kishen* was a deviation from the terms of the mortgage-deed, all the members of that firm, including the Respondent, were parties acquiescing in that deviation, and it was incompetent to any of them to avoid the deed on that ground.

IV. Because the Decree of the Sudder Adawlut proceeded on the assumption of a state of facts in support of which no evidence was given, and the main part of which the Respondent had himself admitted

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to be untrue; and because the Decree was inconsistent with the claim set up by the Respondent.

The Respondent, however, relied upon the Decree pronounced, and prayed that the same might be affirmed, and the appeal dismissed, for the following reason:—

Because under the circumstances of the case, and for the purposes of the suit, the Respondent was entitled to charge the Plaintiffs in the action with the whole amount of the produce of the village, and, according to this mode of accounting, there was nothing due to the Plaintiffs upon their mortgage at the date of the Decree on the appeal, and the sum of only R. 3,000, which was the admitted value of the house at *Surat*, was due at the date of the attachment.

Mr. *Miller*, Q. C., Mr. *Wigram*, Q. C., and Mr. *Jackson*, for the Appellant.

Mr. Serjeant *Spankie*, Mr. *E. J. Lloyd*, and Mr. *Edmund F. Moore*, for the Respondent.

Mr. Baron PARKE:

This is an Appeal from a Decree of the Sudder Dewanny Adawlut, which reversed a Decree of the Zillah Court of *Surat*, and the Appellant prays Her Majesty to reverse the Decree of the Sudder Dewanny Adawlut, and to affirm that of the Zillah Court of *Surat*.

The question arises principally upon the construction of a mortgage-deed, by which the revenues of the village of *Muzeegaum* were mortgaged by the firm of *Lal-kishen*, in which the Respondent was a partner, though he did not actually execute the bond. The revenues of this village were mortgaged upon these

terms. An advance had been made by the Appellant and another person, not a party to this deed, to the amount, nominally, of R. 18,000, but actually R. 16,000 only were advanced, and the advance was made for the purpose of paying the partnership debts of the Respondent and his co-partners, and the deed was executed by two of the co-partners, upon which the question in this case arises.

By that deed it is stipulated that the village of *Muzeegaum* and the house in *Surat* should be mortgaged for the sum mentioned, R. 18,000 and upwards. "The profit (or interest) of this money is "settled for twelve anas, on these conditions, that the "holders of the mortgage are to receive in redemption "the whole of the produce of the said village, about "R. 3,000 or 3,200, and after allowing for interest, the "remainder will go for the purpose of liquidating the "principal, and they shall continue so to receive and "appropriate the annual produce until the whole of "their demand be liquidated. The risk of collecting "the income, and of any deficiency in the revenue, is "upon our heads." That is, the mortgagors. "And "we do further declare, that the holders of the said "mortgage shall station a *Mehta* (or clerk) of their "own in the said village for the purpose of making "the collections; and we, the mortgagors, so long as "this property remains in mortgage, we do agree to "give him a monthly salary of five rupees, and his "daily food, so long as we can afford to do so."

This instrument was not executed by the Respondent, but there is no doubt that it was executed on the partnership account. There is no doubt that he was cognizant afterwards of the execution of this bond, and that he is bound by the contents of that

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bond, and he must be considered, for the purposes of this suit, as being a mortgagor.

There has been some dispute as to what was done by virtue of this bond afterwards. Whether or not actual possession was taken of the property; and their Lordships think the conclusion they ought to come to upon the facts in evidence in the cause is, that actual possession was taken by virtue of the mortgage. It is clear that there was a *Mehta* appointed, who was paid by the mortgagors, and who might have received the rents and profits of the village, and he probably did receive the rents and profits of the village for a year or two, but afterwards permitted the mortgagors to receive them for four or five years afterwards.

Now the question will be, in what way the mortgagee's rights are affected by this conduct, and that will depend first upon the construction of the instrument itself. If this is a binding contract, binding between him and the mortgagors, binding him to apply the rents and profits to the payment of the debt, he might be considered as having forfeited his right to payment in consequence of having allowed the mortgagors themselves to take possession of the rents and profits during some of the years during which his *Mehta* was in possession. But their Lordships are of opinion, that that is not the true construction of the deed, but that it is merely a power to satisfy himself, just as an English mortgagee may, by taking possession of the rents and profits of the estate; and if an English mortgagee chooses to forego the benefit of receiving the rents and profits, and permits the mortgagor to take them, it would have no effect as between him and the mortgagor; he would have a full right to recover his debt by reason of the mortgage. The only effect would be when some subsequent incum-

brancer came in, and he had notice of that claim. In that case the rule and law of *England* would be, that if after notice he permits the mortgagor to receive the rents and profits, he exposes himself to the claim of the second incumbrancer, and that is the principle which their Lordships think ought to be applied to the present case.

That being so, there is no doubt that this transaction was valid up to the time of the notice of the Respondent's claim, that is, up to the time when the attachment was served, by being delivered to the officer of the village, or in whatever way it was executed ; but until that attachment was executed, there was no notice to the mortgagee of any adverse claim on the part of the Respondent. The claim did not arise till the suit for the termination of the partnership was adjusted, at which time the estate became the property of the other partners, and the Respondent became entitled by virtue of that Decree to claim against his co-partners for the amount of 19,000 and odd rupees : when he proceeded to enforce that claim by attachment, he became in the situation of a second incumbrancer, and not before ; and therefore their Lordships are of opinion, that though possession was taken by the mortgagee by means of his *Mehta*, and though he might have received the proceeds of the village from 1819 to 1824 or 1825, yet he is not to be charged in account with more than he actually received during that time. But when the attachment was placed upon the village, he had notice of an adverse claim ; and if after that time he permitted the mortgagor to receive any portion of the profits of that estate, then he ought with respect to the monies so received to be postponed to the subsequent incumbrancer.

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Therefore their Lordships are of opinion that the accounts ought to be taken upon that principle. The effect of that will be, that it will be clear that the mortgagee is unpaid the full amount of the principal and interest: the principal and interest amount to more than 25,000 rupees from the date of the bond down to the period at which the attachment was placed upon the village. During that period it appears that he had received only between 7,000 and 8,000 rupees, and therefore there would be a large balance due to him. But then he is to be charged for about two years, during which time he permitted the mortgagors, after the attachment was placed, to receive the rents and profits of the village. But still that would not be anything near the payment of the principal and interest due upon the bond.

Their Lordships will give a direction to enable the Respondent to enforce his claim against the estate, subject to the account so taken, reserving to the mortgagee his claim for the balance against the house in *Surat*, and also against those who are personally responsible to him for the amount of the money originally advanced, and further also against the proceeds of the estate, as soon as the Respondent's debt is satisfied, provided it turns out that the proceeds are sufficient to discharge his debt, and to leave a surplus.

Therefore the form of the minute which their Lordships will make as to the mode in which the accounts shall be taken in this: "Judgment to be reversed. "Account to be taken of the principal and interest due "on the mortgage of the village of *Muzeegaum*, and the "sums actually received by the Appellant prior to the "time when the attachment issued, and that the Ap-"pellant be charged in that account with the amount

" which he might have received after the attachment, " but for his wilful default." If the attachment prevented him from receiving at all, of course he will not be charged; but if the attachment was only initiative, in order to ground an execution upon it, and still permitting the person in possession to receive the rents and profits, and if he has permitted the mortgagor to receive them, he will be charged: so the words will be, " That the Appellant be charged the amount which he " might have received after the attachment, but for " his wilful default, and that after taking the account, " he be permitted to continue in possession of the " village until the balance due on that account with " interest be fully paid; that after the same is paid, " the Respondent be permitted to proceed under an " attachment to satisfy his demand, reserving to the " Appellant, right to come against the balance of the " proceeds of the estate, after satisfying the Respon- " dent's claim, and against the house at *Surat*, and " against such parties as are personally liable to him " for the balance of his claim."

Then the only remaining question will be the question of costs. Their Lordships are of opinion that it is perfectly clear that he must be entitled to hold the estate for some time to come: he will be entitled to his costs, that is, the costs of the proceeding in the Court below, to be calculated upon the principle adopted in the Zillah Court; and that part of the suit being wrong, and part right, he ought also to have the costs in the Sudder Dewanny Adawlut, and the costs of the appeal, with liberty to redeem the mortgage, by payment of the principal and interest.

RAJAH PEDDA VENCATAPA NAIDOO, Bahadur - - - - - } *Appellant*,

AND

AROOVALA ROODRAPA NAIDOO and PAUPA NAIDOO - - - } *Respondents*.*

On Appeal from the Sudder Dewanny Court of Madras.

July 1st & 2nd, 1841.

A *Zemindar* having discharged certain persons, his *Dewans* and *Tahsildars*, for alleged misconduct, and ejected them from a house and other premises claimed, and occupied by them for above twenty years, and to which he could himself show no title, except as being within his *Zemindary*; and having caused the discharged officers to be placed under personal restraint, and seized all their property situate within his *Zemindary*, decreed on appeal by the Sudder Court, (and affirmed by the Judicial Committee,) to restore possession of the premises, and to pay compensation in damages, with costs, for the wrong and injuries inflicted.

IN this case the suit was instituted to recover damages for certain injuries inflicted by the Appellant on the Respondents *Aroovala Roodrapa Naidoo* and *Aroovala Vencata Royaloo Naidoo*, since deceased, the father of the Respondent *Paupa Naidoo*, and on their property: the damages were laid at rupees 25,557. 15., which consisted of the following items: first, rupees 21,057. 15., the value of certain houses, gardens, goods, chattels, &c., of which the Respondents had been forcibly dispossessed by the Appellant; second, rupees 5,000, on account of damages for personal restraint on themselves and their servants; and lastly, rupees 500, the amount of expenses incurred in seeking redress.

The Appellant was the *Zemindar* of *Calastry*, and other adjoining districts, situate in the *Zillahs* of *Chittoor* and *Nellore*.

The Respondent *Aroovala Roodrapa Naidoo*, who

* Present: Members of the *Judicial Committee*,—Lord Brougham, Mr. Baron Parke, the Right Honourable Sir Herbert Jenner, and the Right Honourable Dr. Lushington.

Privy Councillor,—*Assessor*,—Sir Edward Hyde East, Bart.

succeeded his brother, the father of *Aroovala Vencata Royaloo Naidoo*, held the situation of *Dewan*, or head confidential manager, under the father of the Appellant, and subsequently under the Appellant himself. *Aroovala Vencata Royaloo Naidoo* was also in the employment of the Appellant, and had the management of the revenue districts of *Pamoor* and *Seetaram-poor*, attached to the Appellant's *Zemindary*; he continued in the management thereof until the year 1814-15, when the situation of *Dewan* was conferred on him by the Appellant, in which he continued up to the time of his dismissal, hereinafter mentioned. In the year 1814-15, the Appellant also conferred on *Aroovala Roodrapa Naidoo* the office of *Tahsil* or collector and manager of the districts of *Kutchanad* and *Comara Vijya-nagarum*: and in 1818-19, the *Tahsil* or collectorship of *Pamoor* and *Seetaram-poor*, upon the Respondent *Paupa Naidoo*.

The Respondents lived in a house at *Calastry*, having a garden and offices attached, in which they and *Paupa Naidoo's* father had resided for a period of above twenty years, the house having been built (as it was insisted by the Respondent) by *Paupa Naidoo's* father, on ground purchased by him in the year 1799-1800. They were possessed also of some land cultivated as a garden at *Poondy*, and of other property, consisting of cattle, implements of husbandry and farming stock, in various parts of the Appellant's *Zemindary*.

In the year 1821, the Respondent *Aroovala Roodrapa Naidoo* and the deceased *Aroovala Vencata Royaloo Naidoo*, filed their Plaint in the Provincial Court for the Centre Division of *Madras* against the Appellant, *Rajah Pedda Vencatapa Naidoo Bahadur*, in which, after stating that in the month of *September*

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1819, the Appellant had demanded of *Aroovala Vencata Royaloo Naidoo* a *Nuzzur* or present of 30,000 rupees; and that in consequence of this demand being refused, the Respondents, together with the deceased *Aroovala Vencata Royaloo Naidoo*, had been dismissed from their offices, and the acts of oppression and spoliation on the part of the Appellant, which formed the subject of the suit, and were therein particularly detailed, took place,—proceeded to enumerate the several injurious acts committed by the Appellant in consequence of the refusal of the Plaintiffs to comply with that demand, and for which they claimed as follows:—first, compensation in damages for the restraint placed on their persons by the Appellant; second, for the value of the house at *Calastry*, with the goods and chattels contained therein; thirdly, for the value of a house and garden at *Poondy*, with the goods and chattels therein; fourthly, for the value of crops of grain, straw, cattle, implements of husbandry and other property belonging to the Plaintiffs in twelve different villages therein specified, all of which were attached to the *Zemindary* of *Calastry*; and fifthly, for the personal expenses incurred by the Plaintiff in seeking redress; the total of which damages were laid at the before-mentioned sum of R. 25,557. 15., and were claimed in pursuance of and according to Regulation XXXII. of 1802.

The Appellant, by his answer filed the 14th of *December* 1821, admitted the former employment of the Plaintiffs as *Dewans* and *Tahsildars*, but denied that he had demanded the *Nuzzur*, or had dismissed the Plaintiffs for refusing to comply with such demand, and insisted that such dismissal had been on account of various acts of misfeazance in their offices, and alleged that he had only required of them a settlement

of their accounts: he also denied that the house and premises at *Calastry* was the property of the Plaintiffs, but admitted that he took possession of the garden at *Poondy*, and he did not deny that the Plaintiffs had left cattle, grain, &c., in the villages specified in the plaint, but attributed the loss of the Plaintiffs in part to an inundation which had destroyed one of the villages in which their property was situate: he also denied that he had used any kind of restraint, or committed any act of violence towards the Plaintiffs.

To this answer the Plaintiffs replied, setting forth their title to the house and property more fully, and stating in detail the particulars of the injuries inflicted by the Appellant, and the grievances of which they complained.

The Appellant having replied, evidence, both documentary and oral, was taken on both sides. For the Plaintiffs, the original bill of sale of the land and premises in *Calastry*, a *Sunnud* or deed of assignment of revenue, two *Cowl-namahs* or agreements for farming certain lands within the *Zemindary*, executed by the Defendant, (Appellant,) and various orders and letters from the Magistrates, showing the Plaintiffs' dealing with the property in question, were produced.

The Appellant produced copies of certain proceedings taken by the Magistrates on the complaint of the Respondent, to negative the allegation of his having taken forcible possession of their property, but no document to prove his title to the property in question. Both parties examined witnesses.

Pending the suit, *Aroovala Vencata Royaloo Naidoo*, the first Plaintiff in the cause, died, having previously declared the Respondent *Paupa Naidoo* his heir, in whose name the suit was revived.

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On the 20th of *February* 1824, Mr. *Brown*, the First Judge of the Provincial Court, made his Decree in the suit, by which, after observing on the circumstances of the case, he proceeded to say, "that the Provincial Court had no hesitation in giving their verdict against the charge which the Plaintiffs had set up for damages, inasmuch as it had not been proved either that the indignities complained of were offered to their persons, or, if offered, that it was by authority of the Defendant; then, again, that the amount of property charged to have been seized by the Defendant had been proved by evidence to have been so seized by him, and that as to the other count in their bill of plaint, which regarded the alleged seizure of crops, of articles of husbandry or of cattle, the whole of it seemed to be so entirely the consequence of their own abandonment of their concerns, whatever the nature of those concerns might have been, that the Provincial Court were far from conceiving they could seek any redress for this part of their grievances under sec. 3 of Regulation XXXII. of 1802, which in no respect applied to their case in the present suit. Nor could the Provincial Court, finally, conceive the Plaintiffs in the slightest degree entitled to remuneration for the expenses of their journey to *Chittoor*, or for the expenses incurred by them at that place, on the grounds stated in their plaint," which was accordingly dismissed with costs.

From this judgment, Mr. *Dacre*, the Acting Judge of the Provincial Court, dissented, and subsequently recorded the grounds of his dissent.

The Plaintiffs, the present Respondents, appealed from this Decree to the Sudder Adawlut of *Madras*. The Sudder Adawlut remitted the record to the Pro-

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vincial Court, to take further evidence, with a view to ascertain the authenticity of certain letters brought forward by the Plaintiffs, as sent by the Defendant to his servants, containing orders to attach the Plaintiffs' property. Additional evidence was accordingly taken. On the part of the Plaintiffs, it was proved and admitted by the Defendant's witnesses that these letters were written and sealed by order of the Defendant, and further proof was given that the house in *Calastry* was the property of the Plaintiffs.

On the 15th of *November* 1827, the Sudder Adawlut made its Decree, in which, after stating the material facts and circumstances of the case, the Court observed that, "the Decree of the Provincial Court was passed by the First Judge in opposition to the opinion of his colleague on the Bench, and that it was incumbent upon the Sudder Adawlut to express its decided disapprobation of the principles set forth in their Decree. Those principles, so far as they were intelligible, would, if sanctioned, vest a *Zemindar* with the arbitrary disposal of the persons and property of his servants, and would go to encourage the acts of lawless rapine and violence, which it is the peculiar province of a Court of Justice to restrain and suppress; and therefore it was ordered, That the Decree of the Provincial Court be set aside, and the judgment of the Court, after the most anxious consideration of all the circumstances of the case, was as follows: First, That the Respondent (present Appellant) do pay to the Appellants (present Respondents), rupees 300 each, as compensation for the illegal restraint put upon their persons. Secondly, That the Respondent do replace the Appellants in possession of the house at *Calastry*, and pay to them the sum of rupees 200,

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as compensation for his illegal possession thereof. Thirdly, That the Respondent do replace the Appellants in possession of the house and garden at *Poondy*, and pay to them the sum of rupees 500, as compensation in damages for his illegal possession thereof. Fourthly, That the Respondent do pay to the Appellants the sum of rupees 8,000, as compensation in damages for his illegal seizure of their grain, straw, cattle, implements of husbandry, &c. And, Fifthly, That the Respondent do pay to the second Appellant (*Paupa Naidoo*), the sum of rupees 100, for his extra expenses in his attendance on the Magistrate at *Chittoor*: and further decreed, that each party do respectively pay their own costs, both in this Court and in the Provincial Court."

From this Decree the Appellant appealed to his late Majesty in Council, relying on the following reasons:—

I. Because in the absence of any evidence of the actual damages said to have been incurred through the acts of the Appellant, it was not competent to the Sudder Adawlut to assess the amount of such damages according to an assumed estimate thereof.

II. Because the Respondents were detained at *Poondy*, under the order of a civil Magistrate of competent authority, made upon a representation of facts which remained uncontroverted, and for the consequences of this detention the Appellant ought not to be rendered liable, either in damages or otherwise.

III. Because the house at *Calastry*, and the garden at *Poondy*, were proved to be the property of the Appellant.

IV. Because the Respondents, who were Plaintiffs in the original suit, and not in possession of the house

at *Calastry*, or the garden at *Poondy*, were bound to prove their title thereto, which they had wholly failed to do.

V. Because it was not proved that the grain, cattle, and other agricultural property of the Respondents, was seized by the Appellant or by his orders.

VI. Because the Respondents were not entitled to recover from the Appellant any expenses which they might have incurred in procuring the reversal of a Magistrate's order, made upon a representation of facts which remain uncontroverted.

The Respondents on the other hand submitted that the appeal should be dismissed for the following reasons:—

I. Because the matters complained of by the Respondents were in the particulars and to the extent mentioned in the Decree of the Sudder Adawlut, sufficiently established by the evidence.

II. Because the justification attempted by the Appellant did not constitute a defence to the action.

Mr. *Miller*, Q. C., Mr. *Wigram*, Q. C., and Mr. *Jackson*, for the Appellant,

Relied on the grounds stated in his reasons, and Madras Regulation XXXII. of 1802.

Mr. Serjeant *Spankie*, Mr. *E. J. Lloyd*, and Mr. *Edmund F. Moore*, for the Respondents,

Were not called upon by their Lordships.

Mr. Baron PARKE:

Their Lordships do not think it necessary to trouble the counsel for the Respondents in this case. It appears to their Lordships, who have had an opportunity of considering the ingenious objections that have been

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made to the Decree of the Sudder Dewanny Adawlut, that there is really no sufficient foundation for them, and that they cannot see their way clearly to reversing the present Decree.

With respect to the first objection, which was the last objection of the Appellant, and upon which he relied the most, that the proceedings were informal, inasmuch as it was a suit instituted under the Regulation XXXII. of 1802,* and was not brought within the time within which by the construction of this Regulation it ought to be brought, that is, within a year after the injury sustained, the Court's answer to that is, that that part of the statement in the plaint is really superfluous, and that the plaint having been framed upon the legal title to redress, both for the injury to the person and for the injuries to the land, and for taking away personal property, and the suit having been subsequently conducted as a regular suit, the objection is wholly unavailing; that it is improperly stated in the plaint to have been a suit founded upon this Regulation, which is to give redress to persons whose goods have been taken away without their producing a proof of their title. Now this case has proceeded all along upon the ground of title in the Plaintiff, both as to his claim of compensation for personal injury, and for injury done to his land.

But let us first examine very shortly the different heads, according to which compensation has been awarded by the Decree of the Sudder, and it will be found upon looking at them that each of the grounds taken in that Decree is perfectly well sustained. The first question is with regard to the injury done to the person. There certainly is ample evidence that the Plain-

* This Regulation is now rescinded by Reg. V. of 1822.

tiffs, that is, the now Respondents, had their persons put under restraint by order of the *Rajah*, and for that restraint there has been an award of 300 rupees each, which appeared to the Court below to be a proper compensation. And we certainly are not in a condition to say that that compensation is improper or excessive. It is not merely for the inconvenience which they sustained, but probably that sum was awarded by way of letting the *Zemindars* know that they ought not to exercise any supposed authority which they received in contravention to the law. There seems to have been an impression that the *Zemindar* had a right to restrain the persons of his officers in case he thought proper so to do; and to do away that impression, it was right that there should be more than merely nominal damages for that restraint, in order that the *Zemindars* might know henceforth that they could not proceed upon any such supposed custom. It appears, therefore, to their Lordships that there is no impropriety in the award of the sum of 300 rupees each as compensation for the injury which they thus sustained.

The next question is with respect to the damages for ejecting the Plaintiffs below, the now Respondents, out of their house at *Calastry*. It appears that both parties proceeded to show their title to this house, but neither party was able to give satisfactory evidence of title, and the Sudder Court say, and say very properly, that the long possession which the Respondents have had in the house is a sufficient proof of title in the first instance, and that as the Appellant was not able to give satisfactory proof that he has the title in him, the possession on the part of the Plaintiffs must

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prevail; and that principle is a perfectly just principle. It is for them to judge, who are much more competent to do so than we are, whether the possession under such circumstances as took place in this case was a satisfactory proof of title. Probably in this country we, who are well acquainted with the customs here, should say, that if a servant lived in a house appropriated to a servant, we should rather draw an inference from that, that the possession of the servant was the possession of the master, but the customs and usages in the *East Indies* may be very different in that respect; and as the Court have drawn an inference from the possession that that is evidence of title, we are not in position to say the contrary. We think, in the absence of any proof to the contrary, we must suppose the inference to be correct, that they were possessed in their own right. The principle upon which the Court has proceeded is perfectly correct. The title of possession must prevail until a good title is shown to the contrary. That disposes of the second head of objection.

The third is the claim for the house and garden at *Poondy*, and it is insisted that there was no proof, in the first place, that the Defendant below, the now Appellant, ever took possession of the house. With respect to the garden, there is unquestionable proof; but we think it will be found, from the deposition of one of the Plaintiff's witnesses, *Danum Motialoo*, whose testimony is unimpeached, that there was sufficient proof that the Appellant took possession of the house, and if so, he took possession both of the house and garden, without any title; and we are by no means in a condition to say that the sum which has been

awarded as a compensation to the Respondents, in respect to the occupation of the house and garden, is an improper amount.

Then the next is the largest amount of compensation given, namely, 8,000 rupees. The Court below certainly, as well as ourselves, feel that the evidence which has been given upon this subject, is somewhat vague and unsatisfactory. The amount demanded in the plaint exceeds 24,000 rupees, and the sum awarded for damages is 8,000 rupees. The Court below had much better means than we have of forming an estimate of what the Plaintiff's damage really was. They have given a much smaller sum than was claimed; and it is enough for us to say that we cannot see that they come to a wrong conclusion. There was unquestionably evidence for their consideration to prove that the *Rajah*, and other persons by his authority, had seized property to a very considerable amount. It appears clearly from the parol evidence adduced on the part of the Appellant, and the witnesses mentioned in the Decree, which, although they have not given satisfactory evidence as to the seizure, yet the general complexion of their testimony shows that the *Rajah* did seize some of the property belonging to the Respondents. The Court, upon this part of the case, do not feel that they have any ground to dispute the propriety of the decision at which the Court below have arrived, in awarding the compensation of 8,000 rupees.

The same observation also may be made with regard to the fifth head, under which a small sum has been awarded for compensation for the inconvenience to which one of the Respondents was put in appearing

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before the magistrate. There does not seem to be any reason why that amount should not be allowed. We think therefore, upon the whole, that there is no ground for the Appeal against the Decree, and that the Decree ought to be affirmed, with costs.

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ADMISSION, BY VAKEEL.

The admission and consent of a *Vakeel* made with due authority, will bind his client, though not present at the time of making it. Where, therefore, an order was made for the payment of a certain sum, being the moiety of the profits of an estate founded on the amount for which security had been taken as the rental of the *Zemindary* when possession was given up, and that amount was admitted and assented to by the *Vakeel* in Court, and the order made accordingly,—held by the Judicial Committee (affirming the judgment of the Court below), that such consent was binding on the client, and precluded him from afterwards opening the account. [*Rajunder Narain Rae* v. *Bijai Govind Sing*] - - - 253

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1. A. purchased a *Mootah* of B., and held possession till his death, when B., under the colour of a Bill of Sale alleged by him to have been executed by A. two days before his death, obtained possession. On a claim brought by the widow and heiress-at-law of A. for recovery of the *Mootah* and mesne profits, no sufficient proof of the execution of the Bill of Sale having been given, possession was adjudged to her, with mesne profits from the period of her husband's death. [*Sooriah Row* v. *Cotaghery Boochiah*] - - - - - - - - 113
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3. A *Zemindar* having discharged certain persons, his *Dewans* and *Tahsildars*, for alleged misconduct, and ejected them from a house and other premises claimed and occupied by them for above twenty years (and to which he could himself show no title, except as being within his *Zemindary*); and having caused the discharged officers to be placed under personal restraint, and seized all their property situate within his *Zemindary*, decreed on appeal by the Sudder Court, (and affirmed by the Judicial Committee,) to restore possession of the premises, and to pay compensation in damages, with costs, for the wrong and injuries inflicted. [*Rajah Pedda Vencatapa Naidoo Bahadur* v. *Aroovala Roodrapa Naidoo*] - - - - - 504

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BANKRUPTCY.

1. Assumpsit by the surviving Assignee of a Bankrupt, under an English Commission, against a debtor a native of *India*, and resident within the jurisdiction of the Supreme Court of *Calcutta*. Plea: That the Defendant had not undertaken or promised in the manner or form as the Plaintiff, *Assignee as aforesaid*, had complained against him. Two days after issue joined, the Defendant gave notice that he intended to dispute the trading, petitioning creditor's debt, and bankruptcy. At the trial, copies of the proceedings in the Bankruptcy Court, the Commission, Adjudication and Assignment to the Plaintiff, and his co-assignee, which purported to be certified by the Clerk of the Enrolments, and to be under the seal of the Court of Bankruptcy in *England*, pursuant

to the 2nd & 3rd *Will.* IV., c. 114, s. 9, were given in evidence; but no proof was given that these copies were authentic, nor was the seal proved to be that of the Court of Bankruptcy in *England*. A verdict was given for the Plaintiff, liberty being reserved for the Defendant to move for a nonsuit. A rule *nisi* was afterwards granted, and after argument made absolute, and the verdict set aside, and judgment of nonsuit entered for the Defendant, on the grounds that there was no evidence of an act of bankruptcy—of trading subsequent to the passing of the 6th *Geo.* IV., c. 16; and that neither that Act, nor the 2nd & 3rd *Will.* IV., c. 114, extended to *India*:—held on appeal, affirming the Judgment of the Court below,—

1. That the plea of *non assumpsit* put the Bankruptcy and Assignment at issue sufficiently without any notice.

2. That the form of the plea *Assignee as aforesaid* was not an admission of the Plaintiff's title as Assignee of the Bankrupt, but only used in reference to the description the Plaintiff had given of himself in the declaration.

3. That the Statutes 6th *Geo.* IV., c. 16, and the 2nd & 3rd *Will.* IV., c. 114, made to facilitate the proof of Bankruptcy and Assignment in *England*, did not extend to the Courts in *India*, and that in those Courts such evidence of the Bankruptcy must be given, as would have been required to prove the fact if no Statutory regulations had been made. [*Clark* v. *Mullick*] 263

2 The principle that one creditor shall not take a part of the fund which otherwise would have been available for the payment of all the creditors, and at the same time be allowed to come in *pari passu* with the other creditors, for satisfaction out of the remainder of that fund, does not apply, where that creditor obtains by his diligence something which did not, and could not, form a part of that fund.

The Orphan Chamber of *Batavia*, being the executors of a foreign creditor in the island of *Java*, by their agent in *Calcutta*, proved the amount of their whole debt against the estate of A. B., who had been declared insolvent under the Indian Insolvent Act (9th *Geo.* IV., c. 73), and after making such proof, and receiving the dividends upon the whole debt, instituted a suit in the island of *Java*, to recover a plantation or estate there, held by one of the insolvents as trustee for the firm of A. B., and C. D., in equal shares; to which suit, the assignees of the insolvent appeared as Defendants, but judgment was given in favour of the creditor, and for the sale of the estate for his benefit; the proceeds of which amounted to three-fifths of his whole debt. The assignees of A. B. filed a bill on the Equity side of the Supreme Court at *Calcutta*, against the agent of the foreign creditor, resident within the jurisdiction, praying that

the dividends might be refunded, and that the Defendants might be restrained by injunction from receiving any further dividends, until all the other creditors were put on an equal footing with the creditor at *Java*: the Defendant demurred, and obtained judgment against the assignees. Held, on appeal, by the Judicial Committee, that the estate in *Java*, not passing to the assignees under the assignment, did not form any part of the fund that was available for the benefit of the general creditors, and that the creditor was therefore not bound to refund the dividends, nor ought to be prevented from receiving any future dividends, provided he did not receive more than 20*s*. in the pound upon his whole debt.

But the bill having stated that the creditor had also instituted proceedings against certain debtors of the insolvents at *Bencoolen*; held, that the assignees were entitled, under the prayer for general relief, to an injunction to stay the receipt of further dividends, until the proceedings at *Bencoolen* were abandoned. [*Cockerell* v. *Dickens*] 353

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CHARTERS, *Madras* and *Bombay*, (Construction of).

1. The Supreme Court of Judicature at *Bombay* has no power to admit persons as Attornies and Solicitors to practise in the Courts there, except such as are qualified in the manner pointed out by the *Bombay* Charter and Letters Patent of 1823. establishing the Court—viz., those who have been admitted Attornies or Solicitors in one of the Courts at *Westminster*, or were practising in the Recorder's Court at *Bombay*, at the time of the publication of that Charter. [*Morgan* v. *Leech*] 428

2. *Semble*.—The word "*determination*" in the charter of *Madras* and *Bombay* is equivalent to the "decree or decretal order" of the *Bengal* charter. [*Nathoobhoy Ramdass* v. *Mooljee Madowdass*] - - - 169

COMPROMISE.

A *soluhnamah* or deed of agreement to compromise conflicting claims entered into in the presence of witnesses, and solemnly acknowledged in Court, by parties who were mutually ignorant of their respective legal rights, cannot afterwards be set aside upon plea of ignorance of

the real facts, when the party seeking to avoid the deed had the means of ascertaining those facts within his reach.

Gross fraud and imposition are not to be imputed upon mere suspicion, and unless the charge is proved, a party cannot be released from an agreement entered into by their own solemn act.

The *onus* of showing that a compromise has been fraudulently obtained by intimidation and false representation, is cast upon those who seek to impeach the validity of their own deed. [*Rajunder Narain Rae* v. *Bijai Govind Sing*] - - - 181

CONSTRUCTION.

1. The 21st *Geo.* III., c. 70, s. 24, protecting Provincial Magistrates in *India* from actions for any wrong or injury done by them in the exercise of their Judicial Offices, does not confer unlimited protection, but places them on the same footing as those of English Courts of a similar jurisdiction, and only gives them an exemption from liability when acting *bonâ fide* in cases in which they have mistakenly acted without jurisdiction. [*Calder* v. *Halket*] 293

2. The Statutes 6th *Geo.* IV., c. 16, and the 2nd & 3rd *Will.* IV., c. 114, made to facilitate the proof of Bankruptcy, do not extend to *India* [*Clark* v. *Mullick*] - - - 263

3. The term *Altamgha* or *Altamghainam* in a Royal Grant, does not of itself convey an absolute proprietary right to the Grantee; where, from the general tenor of the grant, it is to be inferred, that a *Wukf*, or endowment to religious and charitable uses, was intended. [*Jewun Doss Sahoo* v. *Shah Kubeer-ooddeen*] - - - - - - - - 390

4. Reg. X. of 1800 does not apply to undivided *Zemindaries*, in which a custom prevails that the inheritance should be indivisable, but only to *Jungle Mahals*, and other entire districts where local customs prevail; and therefore only partially, and to that extent, repeals Reg. XI. of 1793.

By Reg. IV. of 1793, it is provided, that in suits regarding succession, inheritances, marriage, and caste, and all religious usages and institutions, *Mahomedan* laws with respect to *Mahomedans*, and *Hindoo* laws with respect to *Hindoos*, are to be considered as the general rules by which Judges are to form their decision; according to the true construction of which the *Mahomedan* law of each sect ought to prevail as to the litigants of that sect, and not the general or *Soonee Mahomedan* law. [*Rajah Deedar Hossein* v. *Ranee Zuhoor-oon Nissa*] - 441

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EQUITABLE MORTGAGEE.

A petition having been presented to prevent the sale of a house and premises under attachment in satisfaction of a Decree, on the ground that the owner was an infant, and unrepresented in Court; and an order made thereon for the production of the evidence in support of those facts; the petitioner not having produced such evidence, and the sale being about to take place, filed a plaint, claiming the premises in question on his own account, as equitable mortgagee; but having failed in proving either the transfer or payment of the alleged mortgage, the Sudder Court dismissed his suit, and their decree was affirmed, but without costs, upon appeal to His Majesty in Council. [*Pandoorung Bullal Pundit* v. *Balkrishen Hurba-jee Mahajun*] - 60

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HINDOO LAW.

1. By the *Hindoo* law, a *Zemindar* having no issue is capable of alienating, by Deed or Will, a portion of his estate, which, in default of lineal male issue, and intestacy, would vest in his wife; without her consent. [*Mulraz Lachmia* v. *Chalekany Vencata Rama Jaggana-dha Row* - - - - - - - 54

2. By the *Hindoo* law in force in *Mitheela* or *Tirhoot*, the right of succession vests in the descendants in the paternal in preference to those of the maternal line; and such law continues to regulate the succession to property in a family who have migrated from that district, but have retained the religious observances and ceremonies of *Mitheela*.

A suit having been instituted to recover the estate of a *Hindoo Mithalese* by the maternal first cousin of the last male proprietor, who claimed to be entitled according to the law in force in *Bengal*, held by the Judicial Committee (affirming the judgment below), that according to all the authorities, the *Shasters* of *Mitheela* were to govern the succession, and that by them the party in possession being descended in the sixth degree in the paternal line was to be preferred to the maternal line; notwithstanding that part of the property was locally situate in *Bengal*, and that the last proprietor was domiciled there. [*Rajunder Narain Rae* v. *Rutcheputty Dutt Iha*] - - - - - - - 132

3. According to the *Hindoo* law, the widow, in default of issue, is entitled to succeed to the whole of her deceased husband's estate; but her title to such estate is only as tenant for life, and she has no power to alienate or devise any portion of her husband's estate, which on her death devolves to his legal heirs. [*Keerut Sing* v. *Koolahul Sing*] 331

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"HINDOO LAW," 2.

LIMITATION OF SUITS.

An endowment for charitable and public purposes being a perpetual endowment, it is by Reg. XIX. of 1810, the duty of the Government to preserve its application, and being excepted by sec. 2 of Reg. II. of 1805, from the general operation of the Regulation of Limitation, no suit for its recovery is barred until at least the officer entitled to administer it has been in possession of his office for twelve years. [*Jewun Doss Sahoo* v. *Shah Kubeer-ood-deen*] - - - - - - 390

See "ADVERSE POSSESSION," 2.

MADRAS CHARTER.

See "CHARTER," 2.

MAHOMEDAN LAW.

1. According to the Mahomedan law, it is not necessary in order to constitute a *Wukf*, or endowment to religious and charitable uses, that the term *Wukf* be used in the grant, if, from the general nature of the grant, such tenure can be inferred. [*Jewun Doss Sahoo* v. *Shah Kubeer-ood-deen*] - - 390
2. By Reg. IV. of 1793, it is provided, that in suits regarding succession, inheritances, marriage, and caste, and all religious usages and institutions, *Mahomedan* laws with respect to *Mahomedans*, and *Hindoo* laws with respect to *Hindoos*, are to be considered as the general rules by which Judges are to form their decision: according to the true construction of which the *Mahomedan* law of each sect ought to prevail as to the litigants of that sect, and not the general or *Soonee Mahomedan* law.

In a suit, therefore, by a party in possession of one moiety of a *Zemindary*, for recovery of the other, on the ground that the estate was, according to the family rule, indivisible, it was held by the Judicial Committee, that the property not being a *Jungle Mahal*, within the provisions of Reg. X. of 1800, the family rule, if proved, was abrogated by Reg. XI. of 1793, and (the title-deeds set up in the pleadings not being satisfactorily proved) that

the descent must be governed according to Reg. IV. of 1793, by the laws of the religious sect to which the litigant parties belonged. The Judicial Committee, in affirming the judgment of the Court below, held the *Zemindary* divisible among the co-heirs of the deceased *Zemindar*, according to the laws of the *Sheeah* or *Imameean* sect of *Mahomedans* to which they belonged, according to which law, property descends to the daughters of a deceased brother, in preference to the surviving brother. [*Rajah Deedar Hossein* v. *Ranee Zuhoor-oon Nissa*] 441

MESNE PROFITS.

1. The Provincial Court having dismissed a suit for mesne profits, on the allegation that the evidence on either side was unsatisfactory, and that the Plaintiff had produced spurious accounts and called perjured witnesses, the Sudder Court, on appeal, though dissatisfied with the evidence, reversed the decree, and estimated the amount of mesne profits from the average of the two preceding years, as ascertained in a former suit. The decree of the Sudder Court affirmed by the Judicial Committee, but without costs. [*Sooriah Row* v. *Rajah Enoogunty Sooriah*] - - - - - - 72
2. *Semble.*—The Plaintiff is limited to the sum laid in his plaint as mesne profits, though by the evidence a larger sum appears due to him. [*Sooriah Row* v. *Cotaghery Boochiah*] - - - - - - - - 113

MITHEELA or TIRHOOT.

See "HINDOO LAW," 2.

MORTGAGE.

1. A *Mootah* being advertised for sale by order of the collector, for arrears due to the Government, the proprietor applied to a party to become security for the payment thereof by certain instalments; and thereupon deposited a *Sunnud* and *Arzee* in the hands of a third party, and executed a *Kararnamah* or agreement, by which the transfer of the *Mootah* to the guarantee was made absolute, in case of default by the proprietor, in payment of the instalments. The party becoming security at the same time executed a counter *Kararnamah*, or deed of defeazance, agreeing to give up the *Mootah* when satisfied out of the rents, &c. the principal sum, and interest, which he might advance on account of the security. Default having been made in payment of the first instalment by the proprietor, the guarantee obtained possession of the *Sunnud* and *Arzee*; and upon a further default by the proprietor, procured himself to be registered as owner, and obtained possession of the *Mootah*, insisting, notwithstanding the counter *Kararnamah*, that his title was absolute. On a suit brought by the original proprietor for possession of the *Mootah* and payment of the surplus, after satisfying the advances made on account of the arrears, it was held by the Judicial Committee, affirming

the judgment of the Sudder Court, that the transaction was in the nature of a mortgage, and that the party to whom the *Kararnamah* was executed was only entitled to retain possession of the *Mootah* until he had reimbursed himself, out of the rents and profits, the sums advanced by him on account of his security: the counter *Kararnamah*, though not registered, being a valid instrument, and operating as a deed of defeazance to the title acquired under the first agreement. [*Sri Rajah Kakerlapoody* v. *Sri Rajah Vutsavoy*] - - - - 1

2. Mortgage of a village which was partnership property, made by some of the partners for the benefit of the firm, held binding on a member of the firm, though not executed by him.

In pursuance of a stipulation contained in a mortgage-deed, that the mortgagees should be at liberty to place a *Mehta* (or clerk) of their own to receive the collections, to be paid a weekly salary by the mortgagor, such officer was appointed, who received the collections for the first few years and paid them over to the mortgagees, but afterwards discontinued such payments, and handed over the amount of the collections to the mortgagors. An attachment having issued against the estate, at the suit of a late partner, for the amount of his share of the property upon a dissolution of the partnership, held by the Judicial Committee (overruling the Judgment of the Sudder Court), that the appointment of a *Mehta* by the mortgagees was a possession by them only so long as he continued to pay the collections over to the account of their mortgage, and that the subsequent payment by him of the collections to the mortgagors did not create a forfeiture by the mortgagees; the effect of the power to appoint a *Mehta* being merely equivalent to the mortgagees' right to receive the rents and profits if they should think fit, and would not operate so as to postpone their security to the attachment subsequently obtained, unless they permitted the payments to be made to the mortgagors after notice of such attachment. [*Juggeewun-das Keeka Shah* v. *Ramdas Brijbookun-das*] 487

PARTITION.

1. A suit having been instituted by some of the descendants of a deceased *Rajah* for possession of his property, to which the Defendant laid claim, under an alleged *Wusseeyut-namah*, or deed of gift, proclamation was made, by order of the Provincial Court, for all persons pretending to have any claim to the property in question to come in and prosecute the same; in pursuance of which, the present, with another suit, was instituted. The Provincial Court, being of opinion that the *Wusseeyut-namah* was not authentic, passed a Decree, declaring for the right of succession and inheritance to be among the several claimants, and, pursuant to Regu-

lation III., 1793, s. 13, specified the shares to which they were respectively entitled. An appeal was interposed to the Sudder, by one of the co-sharers, on the ground that the property was a *Raj*, and indivisible, and ought to have been decreed to him, as nearest in descent from the *Raja*, but no fresh evidence, respecting the nature of the property, or the claim of the entirety, as permitted by the practice of the Sudder Court, was produced. The Decree of the Provincial Court was affirmed by the Sudder, and, on appeal to Her Majesty in Council, the Judicial Committee upheld the decision of both Courts below, being of opinion that all parties knew and acted on the knowledge that the suits were not only to decide upon the claim under the *Wusseeyut-namah*, but to determine also what parties were entitled to the property, the subject of the suit; and dismissed the Appeal with costs. [*Ghirdharee Sing* v. *Koolahul Sing*] - - - - - - - - 344

2. The family usage that a *Zemindary* has never been separated, but devolved entire on every succession, though proved to have existed as the custom for many generations, will not exempt the *Zemindary* from the operation of Reg. XI. of 1793, which provides in case of intestacy, for the division of landed estate among the heirs of the deceased, according to the *Mahomedan* or *Hindoo* law.

Reg. X. of 1800 does not apply to undivided *Zemindaries*, in which a custom prevails, that the inheritance should be indivisible, but only to *Jungle Mahals*, and other entire districts, where local customs prevail; and therefore only partially, and to that extent, repeals Reg. XI. of 1793. [*Rajah Deedar Hossein* v. *Ranee Zuhoor-oon-Nissa*] - 441

PARTNERSHIP.

Mortgage of a village which was partnership property, made by some of the partners for the benefit of the firm, held binding on a member of the firm, though not executed by him. [*Juggeewun-das Keeka Shah* v. *Ramdas Brijbookun-das*] - 487

PECUNIARY BEQUEST.

See "EQUITABLE CHARGE ON REAL ESTATE."

PLEADING.

1. Under the prayer for general relief, specific relief may be granted of a different description from the specific relief prayed for by the bill; provided the bill contains charges, putting material facts in issue, which will sustain such relief. [*Cockerell* v. *Dickens*] - - - - - - 353

2. The Plaintiff is limited to the sum laid in his plaint as mesne profits, though by the evidence a larger sum appears due to him. [*Sooriah Row* v. *Cotaghery Boochiah*] 113

See "BANKRUPTCY," 1.

POSSESSION BY MORTGAGEE.

See "MORTGAGE," 2.

PRACTICE.

1. *Semble.*—The right to a party to institute a suit as heir of the original grantee, not having been disputed in the Courts below, cannot be questioned before the Judicial Committee. [*Mills, Collector of Kaira* v. *Modee Peston-jee Khoorsed-jee*] - - - - - - - - 37
2. *Semble.*—A Will established in a former suit cannot be impeached in a subsequent suit brought by the same party. [*Mulraz Lachmia* v. *Chalekany Vencata Rama Jaggana-dha Row*] - - - - - - - 54
3. Leave given to restore an appeal dismissed for want of prosecution, the Appellant's agent, though instructed to prevent the dismissal of the appeal, not having received the transcript until after the expiration of a year and a day from the time of the allowance of the appeal, and the Respondent having in consequence thereof obtained an order of dismissal. [*Sree Mutty Bissnosoondery Dabee* v. *Rajah Burrodacaunt Roy*] - - - - - - - 127
4. Where by the custom in *India* the Respondent (being a *Hindoo* woman of rank) could not be personally served with an Order of Revivor, the Judicial Committee allowed service to be substituted on her *Dewan* or chief servant. [*Clark* v. *Mullick*] - - - - - - 263, 268
5. In reviewing proceedings of the Native Courts in *India*, where the *Hindoo* or *Muhomedan* law is the rule, and the form of pleading wholly different from that in use in Courts where the law of *England* prevails, the Judicial Committee will look to the essential justice of the case, without considering whether matters of form have been strictly attended to. [*Ghirdharee Sing* v. *Koolahul Sing*] - - 344
6. Where matter has been referred by her Majesty to the Judicial Committee, which is not strictly an appealable grievance, their Lordships may, under the reservations contained in the 3rd & 4th *Wm.* IV., c. 41, advise Her Majesty to grant the Petitioner leave to appeal. [*Morgan* v. *Leech*] - - - 428
7. Where an Appeal had been dismissed for want of prosecution, no step having been taken in it for ten years, the Appeal was, upon petition to the King in Council, restored, the Appellant paying the costs of dismissal and restoration; it appearing that the Appellant was ignorant of the proceedings necessary to be taken in this country, and had, though after a lapse of some years, instructed a commercial house in *Calcutta* to prosecute the Appeal, but whose agent in *England* becoming insolvent, no proceedings were taken to bring the case to a hearing. [*Rajah Deedar Hossein* v. *Ranee Zuhoor-oon Nissa*] 441

PRAYER.

See "PLEADING," 1.

PRIVY COUNCIL (Jurisdiction of).

By the Common Law this Court possesses the same power as the Courts of Record and Statute have of rec-

tifying mistakes which have crept in by misprision or otherwise, in embodying its judgments. [*Rajunder Narain Rae* v. *Bijai Govind Sing*] 181

REVIVOR.

See "PRACTICE," 4.

RE-HEARING.

Where an order had been made *ex-parte*, upon the appearance of the Respondents alone, for the dismissal of an appeal and affirmance of the judgment of the Court below, which purported to be upon the hearing of the cause, the Judicial Committee held that such order must be held simply as a dismissal; and it appearing that the Appellants were infants, under the protection of the Court of Wards in *India*, and that the agent appointed by the Court to act as their guardian *ad litem*, in the matter of the appeal, had absconded, and abandoned the cause; their Lordships rescinded the order of dismissal, and restored the appeal on the terms of the Appellants paying the costs and giving access to the transcript of the proceedings in the Court below, in their hands, and undertaking to lodge cases within five months. [*Rajunder Narain Rae* v. *Bijai Govind Sing*] - - - - - - 181

RELIGIOUS CEREMONIES.

See "HINDOO LAW," 2.

RELIGIOUS ESTABLISHMENTS.

See "WUKF."

RESUMPTION.

A village having been granted in *Enam* by the *Peishwa* of the *Deccan*, was after the death of the grantee seized by the *Mamlutdar* or farmer of the revenues, for an alleged debt due to him, and retained until the treaty of *Poona* in 1818, when it came into the possession of the British Government. On a suit instituted by the representatives of the original grantee, for possession of the village, and payment of the arrears of revenue so sequestered, it was held by the Judicial Committee (affirming the decree of the Provincial and Sudder Courts,) that the original resumption was a wrongful act of an individual, and not an act of the State; the British Government were therefore ordered to restore the village, but, pursuant to Reg. V. of 1827, sec. 3, with only six years arrears of revenue. [*Mills, Collector of Kaira* v. *Modee Peston-jee Khoorsed-jee*] - 37

RESTS.

See "INTEREST."

SECTS

(*Soonees and Sheeahs*).

See "MAHOMEDAN LAW," 2.

SECURITY.

See "SURETY."

SERVICE OF ORDER OF REVIVOR.

See "PRACTICE," 4.

SHEEAHS.

See "MAHOMEDAN LAW," 2.

SHERIFF OF MADRAS (Jurisdiction of).

Quere.—Whether the Sheriff of *Madras* can under a *fieri facias* issued out of the Supreme Court, directing him to seize and put up for sale "*goods and chattels within the jurisdiction of the Supreme Court,*" seize and sell lands and chattels in the *Mofussil.* [*Stephen Lazar* v. *Colla Ragava Chitty*] - - - - - 83

SUCCESSION.

See "PARTITION."
"HINDOO LAW."
"MAHOMEDAN LAW."

SUDDER DEWANNY ADAWLUT (Jurisdiction of).

The Sudder Dewanny Adawlut of *Bombay* have no jurisdiction to entertain an appeal from a decision of the Collector or Commissioner appointed to adjust the claims of *Jaghiredars,* which is final, if delivered before the promulgation of Reg. XXIX. of 1827. [*Eshwunt Row Thorat* v. *Nilloba and Joteeba Thorat*] 107

SUPREME COURT OF BOMBAY.

See "CHARTER."

SURETY.

Security of five individuals tendered by a Plaintiff on appeal from the Zillah Court having been reported by the *Nazir* insufficient, the security-bond of an additional surety was offered, and being reported sufficient, was accepted by the Zillah Court. An appeal having been lodged against the sufficiency of this new security, and the Provincial Court having pronounced it insufficient, it was referred back to the Zillah Court, with directions, that unless sufficient security was given, possession of the property in dispute should be delivered to the Collector. The Zillah Court, upon further investigation, being satisfied with the sufficiency of the additional surety, a security-bond was executed in that Court by the Appellant, the additional surety, alone, the other five sureties having failed to perfect their securities. On application after the decision in the cause, and pending an appeal to the King in Council by the Appellant, to be discharged from the liability of his suretyship, on the grounds that the rejection of his security by the Provincial Court for insufficiency, thenceforth rendered his security null and void, and that the acceptance of his security alone by the Zillah Court, without the other five sureties, was without his knowledge and consent,—it was held by the Privy Council (affirming the judgment of the Court below), that the security-bond being on record, was not voided by the rejection by

the Provincial Court on its supposed insufficiency; the Zillah Court having revived the same by their acceptance of the Appellant as surety, and he having taken no steps to discharge his liability, by having the security-bond taken off the file. [*Gopal Inder Narain Roy* v. *Jagarnath Gurg*] - - - - - 311

TENANT FOR LIFE.

See "HINDOO LAW," 3.

TRESPASS.

Trespass will not lie against a Judge for acting judicially but without jurisdiction, unless he knew, or had the means of knowing, of the defect of jurisdiction, and it lies upon the Plaintiff, in every such case, to prove that fact. [*Calder* v. *Halket*] 293

USAGE.

See "HINDOO LAW," 2.
"PARTITION," 2.
"MAHOMEDAN LAW," 2.

WIDOW (HINDOO).

See "HINDOO LAW," 3.

WITNESSES, REFUSAL TO EXAMINE.

In a suit for possession of *Zemindary* and other estates claimed as son and heir of the deceased *Zemindar*, the Defendants denied the title of the Plaintiff, alleging, that he was a spurious and supposititious child, and tendered fifty-eight witnesses to prove that fact: the Zillah Court having taken the depositions of thirty of these witnesses, refused to permit the remaining twenty-eight to be examined, on the ground, that being to prove the facts deposed to by those already examined, it was unnecessary to take their depositions, and, ultimately, decided in favour of the Plaintiff: the Defendants appealed to the Sudder Court, which refused to examine the witnesses rejected by the Zillah, and affirmed the Decree of that Court. On appeal to Her Majesty in Council, the Judicial Committee remitted the case back to the Sudder Court, being of opinion, that the refusal by that Court to admit the examination of the witnesses tendered, was irregular, and that no decision could be come to upon the merits under such circumstances. [*Jeswunt Sing-jee* v. *Jet Sing-jee*] 424

WUKF.

The term *Altamgha* or *Altamghainam*, in a royal grant, does not, of itself, convey an absolute proprietary right to the grantee, where, from the general tenor of the grant, it is to be inferred, that a *Wukf*, or endowment to religious and charitable uses, was intended, and property so endowed cannot be alienated by the grantee or his representatives.

According to the Mahomedan law, it is not necessary, in order to constitute a *Wukf*, or endowment to

religious and charitable uses, that the term *Wukf* be used in the grant; if, from the general nature of the grant, such tenure can be inferred.

An endowment for charitable and public purposes being a perpetual endowment, it is the duty of the Government to preserve its application. [*Jewun Doss Sahoo* v. *Shah Kubeer-ood-deen*] - - - - 390

WUSSEEYUT-NAMAH.

Where a party claimed possession of a *Raj*, by virtue of a *Wusseeyut-namah*, (or deed operating as a Will,) from the widow of a deceased *Zemindar*, who died without issue, leaving collateral heirs, the Judicial Committee refused to decide on the validity of the instrument devising the *Raj*, being of opinion that the *Ranee* (the widow) was incompetent by law to execute such an instrument to the prejudice of her deceased husband's heirs, and therefore affirmed the decree of the Court below, with costs. [*Keerut Sing* v. *Koolahul Sing*] 331

See "PARTITION," 1.

ZEMINDAR.

See "ADVERSE POSSESSION," 3.

ERRATA.

Page 54, marginal note, *for* rest in his wife *read* vest in his wife.
139, *for* Sullit Narain Rae *read* Lullit Narain Rae.
229, *for* 2 Mac. Hindoo Law, 33 *read* 1 Mac. Hindoo Law, 33.
390, marginal note, *for* terms *read* term.

RICHARD KINDER, PRINTER, GREEN ARBOUR COURT, OLD BAILEY.